APPENDIX A

United States District Court, Southern District of Indiana, Indianapolis Division

In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation

No. IP-00-9373-C-B/S

July 27, 2001

ORDER GRANTING IN PART AND DENYING IN PART THE MOTION TO DISMISS THE MASTER COMPLAINT

Sarah Evans Barker, District Judge.

This cause is before the Court on the Motion to Dismiss the Master Complaint in this Multi-District Litigation ("MDL"), filed by defendants Bridgestone/Firestone, Inc., ("Firestone") and Ford Motor Company ("Ford"). The motion is fully briefed, and the Court, being duly advised, **GRANTS IN PART AND DENIES IN PART** the motion for the reasons set forth below.[1]

BACKGROUND

The Master Complaint, which was filed in this Court on January 2, 2001, combines dozens of class action complaints involving Firestone tires that were filed in or removed to federal district courts throughout the country and transferred to this MDL proceeding. The named Plaintiffs in the Master Complaint are residents of 27 different states[2] who seek to

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[1] The Court has addressed the issue of federal preemption under the Motor Vehicle Safety Act, 49 U.S.C. § 30101 *et seq.*, raised in the motion to dismiss Plaintiffs' Eighth Claim for Relief in a separate Order issued simultaneously with this ruling.

[2] The named Plaintiffs reside in Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, New Jersey, New York,

represent a class ("the Tire Class") essentially consisting of "all persons and entities in the United States who now own or lease, or owned or leased, vehicles that are or were equipped with Firestone-brand ATX, ATX II, Firehawk ATX, ATX 23 Degree, Widetrack Radial Baja, Wilderness, or other comparably designed or manufactured Firestone-brand, steel-belted radial tires" ("the Tires") and a separate class ("the Explorer Diminution Class")[3] essentially consisting of "all persons and entities in the United States who now own or lease, or owned or leased, Ford Explorer sport-utility vehicles, regardless of the tires with which those Explorers were equipped."[4] Defendant Firestone is an Ohio corporation with its principal place of business in Nashville, Tennessee. Defendant Ford is a Delaware corporation with its principal place of business in Dearborn, Michigan.[5]

The specific claims asserted in the Master Complaint are set out in detail below, but in general Plaintiffs allege that the Tires are defective due to their design and/or method of manufacture. The defect causes the Tires to have "an unreasonably dangerous propensity to suffer complete or substantial tread separation or 'belt leaves belt' separation." Master Complaint, P 4. In addition, Plaintiffs allege that certain models of the Ford Explorer have "significant handling and

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North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, and West Virginia.

[3] The Court has not yet ruled on Plaintiffs' Motion for Class Certification. We use these terms throughout this Order simply to describe the allegations of the Master Complaint.

[4] The Master Complaint proposes various subclasses. Except where specifically noted, the subclasses are not relevant to the resolution of this motion to dismiss.

[5] Defendant Bridgestone Corporation ("Bridgestone"), the Japanese parent company of Firestone with its principal place of business in Tokyo, Japan, disputes this Court's jurisdiction over it and has not joined in the instant motion to dismiss.

stability defects" which created "a substantial risk of rollovers and other safety problems." *Id.*, PP 63-66, 70. In order to compensate for these stability defects, Plaintiffs allege that Ford and Firestone agreed to lower the recommended tire pressure on the Firestone tires that were used as original equipment on the Explorer. This had the effect of lowering the likelihood of rollover accidents, but also had the effect of exacerbating the tire defect and "substantially increasing the risk of tread separation and other catastrophic tire failures." *Id.* at PP 70-71.

The Master Complaint asserts federal claims pursuant to the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(1), and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, and pendent state law claims for unjust enrichment, breach of express warranty, breach of implied warranty, negligence, violation of consumer protection statutes, and redhibition (under Louisiana statute). The Master Complaint specifically excludes any claims for personal injury or wrongful death resulting from accidents caused by the alleged defects; rather, it seeks remedies for those Tire and Explorer owners who have not been involved in accidents, but allegedly have suffered injury simply because they own(ed) or lease(d) defective vehicles or vehicles with defective tires.

ANALYSIS OF DEFENDANTS' MOTION TO DISMISS

I. Choice of Law

Defendants have moved to dismiss the Master Complaint on a variety of grounds. Before addressing any of the arguments raised by Defendants, we must first determine the appropriate law to apply to each of Plaintiffs' claims. For the federal claims asserted in the Master Complaint, the answer is relatively straightforward: for any questions of federal law about which federal circuits disagree, this Court, as the transferee court, applies the law of the federal circuit in which it

sits, in this case the Seventh Circuit. *In re Korean Air Lines Disaster of September 1*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) ("The law of a transferor forum on a federal question . . . merits close consideration, but does not have stare decisis effect in a transferee forum situated in another circuit."), judgment aff'd by *Chan v. Korean Air Lines*, Ltd., 490 U.S. 122 (1989); *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1126 (7th Cir. 1993) ("We agree with *Korean Air Lines* that a transferee court normally should use its own best judgment about the meaning of federal law when evaluating a federal claim . . . .").

The choice of law issue for the state law claims in the Master Complaint is more complex, however. The threshold question is whether the relevant substantive laws of the different states involved are sufficiently different to require a choice of law analysis. *See Jean v. Dugan*, 20 F.3d 255, 260 (7th Cir. 1994) (citation omitted) ("This court has held that before 'entangling itself in messy issues of conflict of laws a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states."). We conclude that Defendants have demonstrated such differences in the relevant states' laws.

We move to the next question, that is, which state's choice of law analysis should be used. Guidance is provided by the Seventh Circuit's holding that the choice of law rules of the forum state must be applied to determine the appropriate law to be applied to state law claims, whether they are premised on diversity of citizenship or are pendent to federal claims. *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 681 (7th Cir. 1986). In MDL proceedings, the forum state generally is the state in which the transferor court of each individual action sits; in other words, the transferee court must make an independent choice of law determination for each state from which a case was transferred into the MDL proceeding. *See In re Air Crash*

Disaster Near Chicago, Ill., on May 25, 1979, 644 F.2d 594, 610 (7th Cir. 1981) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Van Dusen v. Barrack*, 376 U.S. 612 (1964)); *In re Air Crash Disaster at Boston, Mass., on July 31, 1973*, 399 F. Supp. 1106 (D. Mass. 1975)). However, the parties agree that this Court should be treated as the forum court because Plaintiffs filed their Master Complaint in this Court. Indiana's choice of law rules therefore are applicable.

A. Law Applicable to Plaintiffs' Tort Claims

The Master Complaint asserts a common law negligence claim, as well as a claim for violation of state consumer protection statutes, the latter of which we view to be most closely analogous to a common law tort claim for fraudulent misrepresentation and therefore subject to the choice of law analysis for tort claims.[6] Indiana follows a modified form of

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[6] Courts consistently examine the specific claims made in a particular case to determine whether a claim under a consumer protection statute should be treated as a tort or a contract action for choice of law purposes. *See, e.g., Hiller v. Manufacturers Product Research Group of North America, Inc.*, 59 F.3d 1514, 1537 (5th Cir. 1995) (plaintiffs' claim under Texas Deceptive Trade Practices Act sounded in tort); *Crellin Technologies, Inc. v. Equipmentlease Corp.*, 18 F.3d 1 (1st Cir. 1994) (plaintiff's claim under Massachusetts's unfair trade practices law treated as tort claim for choice of law purposes because it resembled tort of fraudulent misrepresentation); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 213 (E.D. Pa. 2000) (noting that claims under consumer fraud statutes may be based either in tort or contract law, and finding that "tort law is more appropriately applied considering the facts of this case" and therefore conducting a tort choice of law analysis to determine which state's statute should be applied); *Griffin v. Security Pacific Auto. Finan. Servs. Corp.*, 25 F. Supp. 2d 1214, 1216 (D. Kan. 1998) (applying, without comment, Kansas tort choice of law analysis to determine which state's consumer protection statute applied); *Mead Corp. v. Stevens Cabinets, Inc.*, 938 F. Supp. 87, 89 (D. Mass. 1996) (finding that plaintiff's claim under Massachusetts consumer protection statute was "no more than a dressed-up breach of contract or breach of warranty claim" rather than a "separate, tort-based theory of fraud").

the traditional *lex loci delicti commissi* rule in analyzing the choice of law question in tort cases. *Hubbard Mfg. Co., Inc. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987). Under the traditional rule, the substantive law of the "place of the tort" is applied--that is, the state in which the last event necessary to make the defendant liable for the alleged wrong took place, typically the state in which the injury occurred. *Id.* at 1073. Under the modified rule established by the Indiana Supreme Court in *Greeson*, this rule applies unless the place of the tort "bears little connection to the legal action." In those cases, other factors are considered, such as:

> 1) the place where the conduct causing the injury occurred;
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> 2) the residence or place of business of the parties; and
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> 3) the place where the relationship between the parties is centered.

Id. at 1073-74 (citing *Restatement (Second) of Conflicts of Laws* § 145(2) (1971)). "These factors should be evaluated according to their relative importance to the particular issues being litigated." *Id.* at 1074.

Following the dictates of *Greeson*, we begin our choice of law analysis for the tort claims in the Master Complaint by determining the place of the tort for each named Plaintiff. As noted above, the place of the tort typically is the state in which the injury to the plaintiff occurred. In this case, Defendants argue, and Plaintiffs do not dispute, that any injury suffered by Plaintiffs occurred in each Plaintiff's home state, or perhaps more precisely in the state in which each Plaintiff purchased an Explorer or one or more of the Tires.

Whether these states "bear little connection" to this litigation turns on the nature of the tort claims in this action. The essence of Plaintiffs' tort claims is that Defendants were negligent in "designing, manufacturing, advertising, and sell-

ing" vehicles and tires that were unreasonably dangerous. Master Complaint, P 327. This negligence allegedly caused Plaintiffs to suffer actual damages and has threatened them with "irreparable harm by undue risk of physical injuries or death." *Id.* at P 329. Plaintiffs also allege that Defendants violated "any and all state consumer protection statutes"[7] in a number of ways, including by representing "through their advertising, warranties, and other express representations, that the [Firestone tires] and Explorers had benefits or characteristics that they did not actually have." *Id.* at P 308. Plaintiffs therefore seek compensatory and punitive damages as well as equitable relief.

The basic factual allegations[8] in the Master Complaint relating to Plaintiffs' tort claims are as follow:

> 1. The Firestone tires at issue are defective due to their design and/or method of manufacture. The defect causes the tires to have "an unreasonably dangerous propensity to suffer complete or substantial tread separation or 'belt leaves belt' separation." Master Complaint, P 4.
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> 2. Ford designed, marketed and sold the Explorer with "significant handling and stability defects" which created "a substantial risk of rollovers and other safety problems." *Id.* at PP 63-66, 70.

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[7] The Master Complaint's Tenth Claim for Relief is entitled "Violation of all States' Consumer Protection Statutes." The complaint does not specifically cite any state's statute. In their brief in response to the motion to dismiss, Plaintiffs argue that the Tennessee Consumer Protection Act applies to their claims against Firestone and the Michigan Consumer Protection Act applies to their claims against Ford.

[8] This summary of Plaintiffs' allegations is in no way intended to be exhaustive.

3. Ford's engineers recommended certain design modifications that would correct these defects, but Ford did not implement those changes because they would have caused a delay in production of the Explorer. *Id.* at P 70.

4. Instead of implementing the modifications recommended by their engineers, Ford, with Bridgestone and Firestone's agreement, utilized a "quick fix" to the Explorer's rollover problem: it lowered the tire pressure on the Firestone tires used as original equipment on the Explorer. This had the effect of lowering the likelihood of rollover accidents, but also had the effect of exacerbating the tire defect and "substantially increasing the risk of tread separation and other catastrophic tire failures." *Id.* at PP 70-71.

5. Defendants failed to conduct safety tests on the Explorer with the lowered tire pressure. *Id.* at P 78.

6. Defendants knew that the Explorer's weight capacity of 750 to 1310 pounds, depending on the model, was likely to be exceeded with normal use of the vehicle, thereby further increasing the risk of tire failure. *Id.* at P 77.

7. Defendants knew of the defects in the Firestone tires and the Explorer and the fact that they had caused numerous accidents resulting in serious injuries and death, especially in hot weather climates, but chose to "cover up" those defects for several years before finally announcing a limited recall in August 2000. *Id.* at PP 79-93.

8. The August 2000 recall was inadequate because it did not include all models of Firestone

tires with the tread separation defect. *Id.* at P 105.

9. Ford has increased its recommended tire pressure for Explorers, forcing Explorer owners into "a potentially deadly catch-22" of choosing between the higher tire pressure, which leads to a higher rollover risk, or the lower tire pressure, which leads to a higher tread separation risk. *Id.* at PP 120-21.

10. Defendants made fraudulent misrepresentations in their national advertising campaigns regarding the "features, safety, quality, and value" of the Firestone tires and Explorers which induced the Plaintiffs to purchase or lease them. *Id.* at P 122.

An examination of these allegations indicates that the place where each allegedly defective tire and/or Explorer was purchased or used is insignificant to Plaintiffs' claims. All of the alleged tortious conduct took place at each Defendant's principal place of business--Michigan for Ford, Tennessee for Firestone. Ford and Firestone sell their products in every state in the nation. The place where each Plaintiff purchased his or her vehicle or tire is entirely irrelevant to Plaintiffs' tort claims, as evidenced by the fact that, under Plaintiffs' theory, each Plaintiff would have suffered the identical injury wherever he or she purchased or used the defective tire or vehicle. Thus, we conclude that any place where the tort manifested itself other than the point of manufacturing and marketing has little connection to the tort claims in the Master Complaint.

This result is consistent with Indiana cases and federal cases applying Indiana law. For example, in *KPMG Peat Marwick v. Asher*, 689 N.E.2d 1283 (Ind. Ct. App. 1997), a class of nearly 600 Indiana farmers sued the accounting firm of KPMG Peat Marwick ("Peat Marwick") for negligently

auditing the financial statements of Merchants Grain, Inc. ("MGI"), a company that operated grain elevators in Indiana and other states. MGI filed bankruptcy after failing to pay for the grain the farmers deposited in MGI's elevators. The farmers alleged that Peat Marwick's negligent audit of MGI permitted MGI to renew its federal license to operate grain elevators, and that "had the financial statements fairly portrayed the financial condition of MGI in all material respects, MGI would not have been eligible for USDA licensing." *Id.* at 1285. The court applied the Indiana choice of law rule for tort claims as set forth in *Greeson*. The parties agreed that the place of the tort was Indiana, and the defendant argued that Indiana had a significant connection to the lawsuit because the plaintiffs were farmers who resided in Indiana and deposited their grain in elevators located in Indiana in "alleged reliance upon the existence of a USDA license posted on the wall" in Indiana. The court, however, disagreed, noting that:

> Designated evidence indicated the audit was prepared by Peat Marwick in Missouri, for a client whose principal place of business was Missouri, for submission to a Missouri office of USDA, which office then relicensed MGI. The presence of these facts in an action for accountant negligence render insignificant, in a choice-or-law [sic.] analysis, the Indiana nature of the farmers' contacts.

Id. at 1287. In other words, because all of the defendant's conduct relevant to the plaintiffs' tort claims took place in Missouri, and the plaintiffs would have suffered the same injury whether they had deposited their grain in Indiana or in an MGI elevator located in another state, the court determined that Indiana's connection to the lawsuit was insignificant. *See also Castelli v. Steele*, 700 F. Supp. 449 (S.D. Ind. 1988) (finding that the place of the tort, Illinois, bore little

connection to a medical malpractice action filed by an Illinois resident who received alleged negligent medical care while in Indiana and negligent advice in Illinois over the phone from the same Indiana doctor).[9]

Because in this case any place other than where the Tires and the Explorers were manufactured bears no significant connection to the Plaintiffs' tort claims, *Greeson* instructs that we must consider other factors to determine the appropriate law to apply, such as: the place where the conduct

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[9] Contrast the cases cited above with the following cases in which courts have held that the place of the tort did bear a significant connection to the lawsuit: *Cox v. Nichols*, 690 N.E.2d 750 (Ind. Ct. App. 1998) (place where automobile collision occurred bore significant connection to lawsuit arising out of the collision); *Tompkins v. Isbell*, 543 N.E.2d 680, 682 (Ind. Ct. App. 1989) (same, because "the parties' conduct in operating their motor vehicles prior to the collision will be the focus of attention to determine liability"); *Bencor Corp. v. Harris*, 534 N.E.2d 271, 273 (Ind. Ct. App. 1989) (Plaintiff, a Tennessee resident, was injured while working on a construction job in Indiana for his Tennessee employer; court held that because "the performance of the construction contract, the direction of the workman, the instrumentality that caused injury, the alleged negligence, and the injury all occurred in Indiana" and "Indiana safety and building codes" were also at issue, Indiana had a significant connection to the tort claim.); *Judge v. Pilot Oil Corp.*, 205 F.3d 335, 337 (7th Cir. 2000) (in wrongful death action involving shooting in Indiana, the place of shooting--"the last (and only) event making the defendants liable"--was significant, in that "the parties' conduct in Indiana that resulted in David's death will be the key element to determine if the defendants should be held accountable for David's death"); *Kamel v. Hill-Rom Co., Inc.*, 108 F.3d 799, 805 (7th Cir. 1997) (the place of the tort, Saudi Arabia, had a significant connection to Saudi citizen's claim against Indiana corporation for various torts arising out of agreement that plaintiff would promote, market and sell defendant's products in Saudi Arabia; Saudi Arabia was residence of plaintiff and one of the defendants and was "the locale where the parties conducted their ongoing business relationship"); *but see In re Estate of Bruck*, 632 N.E.2d 745, 747-48 (Ind. Ct. App. 1994) (Ohio, where automobile accident killed two Indiana residents, had an insignificant connection to the lawsuit because the deceased "had no connection with Ohio other than to make use of the Ohio Turnpike in travelling from New York to Indiana.").

causing the injury occurred, the residence or place of business of the parties, and the place where the relationship between the parties is centered. These and any other relevant factors are to be evaluated "according to their relative importance to the particular issues being litigated." *Greeson*, 515 N.E.2d at 1074.

Applying the *Greeson* factors to this case, we note that the named Plaintiffs reside in 27 different states, and the proposed classes include residents of all 50 states and the District of Columbia. However, as discussed in detail above, we find no basis on which to conclude that the residences of Plaintiffs are important to this litigation. Neither is the fact that Firestone, by virtue of its place of incorporation, is an Ohio corporation or that Ford is a Delaware corporation. Further, the relationship between the parties is simply that of buyer and seller; while Plaintiffs allegedly were injured because they bought Defendants' products, the place where they were purchased is not significant to a Plaintiff's tort claims. What is significant, and what will be the focus of this litigation, is the conduct of Defendants as manufacturers. As set forth above, Plaintiffs assert, and Defendants do not dispute, that virtually all of the alleged tortious conduct by the Defendants took place at each Defendant's principal place of business--Michigan for Ford and Tennessee for Firestone. In short, that is where the allegedly defective tires and Explorers were designed; that is where Ford allegedly made the decision not to institute the design changes recommended by its engineers, but rather to lower the recommended tire pressure for the Explorer; that is where decisions regarding advertising were made; and that is where all decisions regarding the scope of the recall were made. Just as the court in *Asher* determined that Missouri law should apply because Missouri was "the place where virtually all of the acts of the alleged negligent audit occurred," 689 N.E.2d at 1287, and the court in *Castelli* determined that Indiana law should apply because all of the defendant-doctors' alleged negligent actions

occurred in Indiana, 700 F. Supp. at 454-44, this court determines that, for purposes of Plaintiffs' tort claims, the law of Michigan should apply to Ford and the law of Tennessee should apply to Firestone. Further, Plaintiffs' claims for violation of state consumer protection statutes will be treated as a claim for violation of the Michigan Consumer Protection Act ("MCPA"), Mich. Comp. Laws § 445.901 *et seq.*, against Ford, and a claim for violation of the Tennessee Consumer Protection Act ("TCPA"), Tenn. Code Ann. § 47-18-104 *et seq.*, against Firestone. To the extent that the Master Complaint purports to assert claims under any other states' consumer protection statutes, those claims are hereby **DISMISSED**.[10]

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[10] Defendants, relying upon *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), argue in passing that this result would be unconstitutional. In *Shutts*, the Supreme Court reasserted its earlier holding in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), that "'for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Shutts*, 472 U.S. at 818 (quoting *Hague*, 449 U.S. at 312-13). It then applied that holding to the case before it, in which a Kansas court had applied Kansas law to a nationwide class action suit brought by gas company investors seeking to recover interest on royalties. The Court, noting that the defendant was not a resident of Kansas and that over 99% of the gas leases involved in the suit and some 97% of the plaintiffs had no connection at all to Kansas, found the blanket application of Kansas law to all of the plaintiffs' claims unconstitutional. This case clearly is factually distinguishable from *Shutts*. In our case, all of Plaintiffs' claims are connected to Michigan and/or Tennessee, because, as discussed above, virtually all of Defendants' actions relevant to Plaintiffs' claims took place in those states. In contrast, the vast majority of the plaintiffs' claims in *Shutts* had nothing at all to do with Kansas; they involved leases in other states held by plaintiffs who resided in other states, and nothing relevant to those plaintiffs' cases occurred in Kansas. Accordingly, *Shutts* does not dictate a finding that it would be constitutionally impermissible to apply only Tennessee and Michigan law to all of Plaintiffs' claims in this case.

B. Law Applicable to Plaintiffs' Contract Claims

In addition to their tort claims, Plaintiffs assert claims for breach of express warranty and breach of implied warranty. These claims, which are premised on sections of the Uniform Commercial Code, sound in contract, and therefore Indiana's choice of law rules for contract claims apply. *See Thiele v. Faygo Beverage, Inc.*, 489 N.E.2d 562, 577 (Ind. Ct. App. 1986) (holding that warranty actions based on the Uniform Commercial Code sound in contract). In addition, Plaintiffs assert a claim for unjust enrichment, which is a quasi-contractual claim, and is therefore also analyzed under the choice of law rules for contracts. *See Community Care Centers, Inc. v. Sullivan*, 701 N.E.2d 1234, 1239 (Ind. Ct. App.

Defendants also argue that the home states of Plaintiffs have a greater interest in having their law applied to protect their residents than do the home states of Defendants. This may or may not be the case. Numerous states do apply a "governmental interests" test for choice of law, or at least treat as an important factor each state's relative interests in having its law applied to a particular cause of action. *See, e.g., Washington Mutual Bank, FA v. Superior Court*, 15 P.3d 1071, 1077 (Cal. 2001) (Under California law, when an action involves claims of non-California residents, "the trial court may analyze the governmental interests of the various jurisdictions involved to select the most appropriate law."); *Fu v. Fu*, 733 A.2d 1133, 1142 (N.J. 1999) (noting that the competing interests of the relevant states is "the most significant factor in the tort field" in New Jersey choice of law analysis); *District of Columbia v. Coleman*, 667 A.2d 811, 816 (D.C. 1995) ("In determining which jurisdiction's law to apply in a tort case, we use the 'governmental interests' analysis, under which we evaluate the governmental policies underlying the applicable laws and determine which jurisdiction's policy would be more advanced by the application of its law to the facts of the case under review."); *American Family Mut. Ins. Co. v. Farmers Ins. Exch.*, 504 N.W.2d 307, 309 (N.D. 1993) ("The law of the jurisdiction whose 'interests are more deeply affected by the issues raised' should govern.") (citation omitted); *Barringer v. Idaho*, 727 P.2d 1222, 1226 (Idaho 1986) ("The conflict between the states' laws should be resolved rationally based upon the interests and policies of each state."). However, this factor is not determinative, or indeed generally even considered, by Indiana courts in making choice of law decisions in either tort or contract cases.

1998) (describing claim for unjust enrichment as quasi-contractual in nature), trans. denied (1999); *Johnson v. Ventra Group, Inc.*, 191 F.3d 732, 741 (6th Cir. 1999) (citation omitted) (noting that "Michigan's choice of law rules governing contract actions have also been applied to the quasi-contractual claim of unjust enrichment").

To determine the applicable law in a contract claim, Indiana courts "'will consider all acts of the parties touching the transaction in relation to the several states involved and will apply as the law governing the transaction the law of that state with which the facts are in most intimate contact.'" *Greeson*, 515 N.E.2d at 1073 (citation omitted). For all of the reasons noted in the previous discussion of Plaintiffs' tort claims, we conclude that Tennessee and Michigan have the most intimate contact with the facts relevant to Plaintiffs' breach of warranty claims against Firestone and Ford, respectively. While Defendants note that "Plaintiffs presumably negotiated and acquired their tires and/or vehicles, primarily used their equipment, and negotiated and received any repair or replacement in their home states," Reply Brief I[11] at 9, these are not the most significant acts relevant to Plaintiffs' breach of warranty claims. In reality, there was no negotiation between the parties regarding either the warranties or the tire replacement under the recall. Indeed, under Plaintiffs' theories, it is entirely irrelevant where each Plaintiff purchased Defendants' products, used Defendants' products most regularly, or resided at the time of purchase or when the Master Complaint was filed. Therefore, it cannot be said that any of those states has the most intimate contacts with the facts of this case. Instead, the facts in dispute all center in Tennessee and Michigan, where Defendants made and executed their decisions regarding both the formation of and alleged breach of any applicable warranties. Therefore,

[11] Defendants filed their initial brief and reply brief in three parts, labeled I, II, and III.

we shall apply Tennessee law to Plaintiffs' contract-based claims against Firestone, and Michigan law to Plaintiffs' contract-based claims against Ford.

C. Choice of Law Analysis Applied to Plaintiffs' Redhibition Claims

In addition to the claims discussed above, the Fourteenth Claim for Relief in the Master Complaint is a claim for breach of the warranty against redhibitory defects under Louisiana law.[12] Redhibition is the voidance of a sale of a consumer product on the ground that the product has a defect rendering it either useless or so imperfect that the buyer would not have originally purchased it. *Black's Law Dictionary* (7th Ed. 1999). Louisiana courts generally treat such claims as contractual in nature. *See Scruggs v. Minton Equip. Co., Inc.*, 722 So. 2d 130, 132 (La. App. 1998) (stating that it is "well settled" that "redhibition is based primarily in contract"); *but see Datamatic, Inc. v. International Business Machs. Corp.*, 613 F. Supp. 715, 718 (W.D. La. 1985) (citing *Lartigue v. R.J. Reynolds Tobacco*, 317 F.2d 19 (5th cir. 1963)) ("Redhibition cases have been aligned with tort actions in conflicts analysis."). Whether viewed as a contract or tort action, however, as noted above, Michigan and Tennessee law, not Louisiana law, apply to Plaintiffs' claims. Plaintiffs do not allege that a redhibition claim is viable under either Tennessee or Michigan law; therefore, Plaintiffs may not maintain an action for breach of warranty against redhibitory defects in this action, and Plaintiffs' fourteenth claim for relief is hereby **DISMISSED**.

II. Standard Applicable to Motion to Dismiss

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[12] This claim is asserted on behalf of a "Redhibition Subclass" consisting of "persons and entities domiciled or residing in the State of Louisiana who bought or leased vehicles in Louisiana that are or were equipped with [the Tires]." Master Complaint, P 137(f).

Defendants move to dismiss various claims in the Master Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that each fails to state a claim upon which relief may be granted.[13] This motion may be granted as to any given claim only if it is clear that Plaintiffs could not prove any set of facts consistent with the allegations in the Master Complaint that would support their claim for relief. *See Holman v. Indiana*, 211 F.3d 399, 402 (7th Cir. 2000), cert. denied, 531 U.S. 880. In ruling on the motion to dismiss, the Court must accept as true all facts asserted in the Master Complaint and draw all reasonable inferences from them in Plaintiffs' favor. *Id.* The Court must also consider facts alleged in Plaintiffs' brief in opposition to the motion to dismiss, [14]as long as they are consistent with the Master Complaint. *Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434, 439-40 (7th Cir. 1994).

III. Sufficiency of Plaintiffs' Allegations of Injury

Defendants contend that the state law claims of all but three of the named Plaintiffs should be dismissed because Plaintiffs have failed to allege that they have suffered any legally cognizable injury as a result of Defendants' actions.[15]

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[13] Defendants several times make the rather obvious point that only those Plaintiffs who own(ed) or lease(d) a Ford Explorer, regardless of the type of tires that it had (or, we note, another Ford vehicle that came with the Tires as original equipment) can possibly have any type of claim against Ford, and only Plaintiffs who own(ed) or lease(d) vehicles with Firestone tires--either as original equipment or aftermarket--can possibly have any type of claim against Firestone. We do not read the Master Complaint in any way to assert the contrary.

[14] Class Plaintiffs' Opposition to Defendants Firestone and Ford's Motion to Dismiss ("Plaintiffs' Opposition").

[15] Three of the named Plaintiffs--Gary Gustafson, William Wehking, and Allan Simpson--allege that they have experienced a tread separation incident with their Firestone tires. Defendants concede that these three Plaintiffs have asserted a legally cognizable injury, but argue that their

Simply put, Defendants argue that the law provides no remedy for a defective product unless or until the defect manifests itself in some way and causes injury to person or property, and in this case Plaintiffs have alleged only that there is a risk that the alleged defects *may* cause a tread separation and/or rollover accident in the future. The Tire Class Plaintiffs counter that the injury to their tires has, in fact, manifested itself because, as a result of the defect in the Tires, "as soon as *any* driving is done, the tire starts to deteriorate abnormally, developing fatigue cracks that, while imperceptible at first, grow and spread" and will eventually lead to tread separation. Plaintiffs' Opposition at 54 (emphasis in original). The Explorer Diminution Class alleges that it has suffered injury in the form of the diminished resale value of their Explorers. Because the nature of injury required to maintain a cause of action differs depending upon the legal theory asserted, we will examine each cause of action in the Master Complaint to determine whether the injury pled by Plaintiffs is sufficient.

A. Negligence

In their Thirteenth Claim for Relief, entitled "Negligence," Plaintiffs assert the following:

> 326. [Defendants] had a duty to Plaintiffs and the Classes to exercise reasonable and ordinary care in the formulation, testing, design, manufacture, and marketing of the Tires and Explorers.
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> 327. [Defendants] breached their duty to Plaintiffs and the Classes by designing, manufacturing, advertising and selling the Plaintiffs and the Classes Tires that have an unreasonably dangerous propensity to experience a sudden and substantial

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claims are without merit for other reasons; those arguments are addressed separately below.

> tread separation, and Explorers that have an unreasonably dangerous propensity to roll over, and by failing to promptly recall the Tires and Explorers or take other appropriate remedial action.
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> 328. [Defendants] should have known that the tires and Explorers were unreasonably dangerous and not as warranted and represented by [Defendants].
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> 329. As a direct and proximate cause of [Defendants'] negligence, Plaintiffs and the Classes have suffered actual damages, and members of the Classes are threatened with irreparable harm by undue risk of physical injuries or death.

This is a classic product liability tort claim: Plaintiffs allege that Defendants designed and sold unreasonably dangerous (that is, defective) products that have caused them injury. However, the injuries alleged by Plaintiffs are not the typical tort damages of injury to person or property resulting from malfunction of a defective product. Indeed, the Tire Class Plaintiffs' tires have not malfunctioned (or, as Plaintiffs would say, have not, malfunctioned *yet*); neither have the Explorer Diminution Class Plaintiffs' vehicles malfunctioned. Rather, Plaintiffs allege that they have been injured by their propensity to malfunction. The issue, then, is whether, under Michigan or Tennessee law, this is a sufficient assertion of injury to sustain a product liability tort claim. Our view is that it is not.

The sale of a defective product, in and of itself, is not an actionable tort. An essential element of a product liability tort claim is an injury to the plaintiff's person or property:

> An actionable tort, whether based on negligence or strict liability, consists of two elements: a failure to act in accordance with the standard of care required by law and a resultant injury. While the

> sale of a defective product creates a potential for liability, the law grants no cause of action for inchoate wrongs. However egregious the legal fault, there is no cause of action for negligence or products liability until there is "actual loss or damage resulting to the interests of another."

Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1136 (5th Cir. 1985) (citing *Prosser and Keeton on Torts*, § 30 at 165 (5th ed. 1984)); *see also Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir. 1985) ("There is generally no cause of action in tort until a plaintiff has suffered identifiable, compensable injury."). As Prosser and Keeton explain, "the threat of future harm, not yet realized, is not enough. Negligent conduct is itself not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered." W. Page Keeton et al., *Prosser and Keeton on Torts* 165 (5th ed. 1984). Although Plaintiffs assert that the Tires have developed fatigue cracks, they do not allege that those cracks have in any way affected the current performance of the Tires. Rather, what the Tire Class Plaintiffs really seek to recover for in this action is the possibility, or increased probability as compared to a non-defective tire, that the Tires will suffer a tread separation in the future because of the defect. Similarly, those Plaintiffs who own(ed) or lease(d) Explorers (including the Explorer subclass in the Tire Class and the Explorer Diminution Class Plaintiffs) seek to recover for the possibility that their Explorers will roll over, or for the lower resale price they might get because of that possibility. These simply are not cognizable tort injuries.

Analogous cases from throughout the country support this holding. For example, in *Weaver v. Chrysler Corp.*, 172 F.R.D. 96 (S.D.N.Y. 1997), the plaintiff alleged that integrated safety seats in certain Chrysler vehicles were defec-

tive because they improperly unlatched and separated. The court found the fact that the plaintiff did not allege that the child seat in his vehicle had ever malfunctioned to be fatal to the plaintiff's tort claims. *Id.* at 100 ("Where, as here, a product performs satisfactorily and never exhibits the alleged defect, no cause of action lies."). Similarly, in *In re Air Bag Prods. Liab. Lit.*, 7 F. Supp. 2d 792 (E.D. La. 1998), the plaintiffs alleged that the air bags in their automobiles were defective because they could seriously injure or kill front seat passengers when they deployed. The court determined that the plaintiffs had failed to state a tort claim because they themselves had not been injured by the air bags; in other words, they had not suffered any manifest injury as a result of the defect. *Id.* at 806 ("Thus, plaintiffs' failure to demonstrate or, even allege, manifest injury or defect shatters an essential element of all their tort and implied warranty claims."). *See also Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1099-1100 (5th Cir. 1991) (while deciding the case on other grounds, noting that "while we recognize that the fear of an unknowable, but potentially fatal, defect in a heart valve is perfectly rational, and almost certainly sincere, we have serious concerns about permitting recovery for such fear absent actual failure of the valve"); *Bravman v. Baxter Healthcare Corp.*, 794 F. Supp. 96 (S.D.N.Y. 1992) ("New York generally does not recognize a cause of action for a faulty heart valve until the valve actually fails and causes a physical harm."), aff'd in part and rev'd in part, 984 F.2d 71 (2d Cir. 1993); *Pfizer, Inc. v. Farsian*, 682 So. 2d 405, 407 (Ala. 1996) ("Alabama courts have never allowed a recovery based on a product that . . . is and has been working properly.").

The cases cited by Plaintiffs do not support their contention that they have suffered an actionable tort injury. In *San Francisco Unified School Dist. v. W.R. Grace & Co.*, 37 Cal. App. 4th 1318, 44 Cal. Rptr. 2d 305 (1995), the plaintiff school district sued for damages resulting from the presence

of asbestos-containing products in some of its school buildings. In the context of determining when the statute of limitations began to run on the plaintiff's claims, the court considered the issue of "what constitutes the element of damage for purposes of strict liability and negligence." *Id.* at 1327, 44 Cal. Rptr. 2d at 310. The court determined that the mere presence of asbestos in a building did not constitute an actionable injury for tort purposes, because "the mere presence of asbestos constitutes only a threat of future harm." *Id.* at 1330, 44 Cal. Rptr. 2d at 315. Instead, tort injury occurs when asbestos contamination occurs--that is, when asbestos fibers are released into the air of the building. *Id.* at 1334, 44 Cal. Rptr. 2d at 314. It is at that point that the health of the occupants of the building is threatened, and therefore it is at that point that a tort injury has occurred.

Application of this holding to the facts of the instant case makes it clear that simply owning tires or a vehicle with a defect is much like owning a building with asbestos in it. Plaintiffs are faced with the threat that the tires may suffer from a tread separation incident at any given moment, or that their vehicle will roll over in the event of an accident, in the same way the building owner is faced with the threat that the asbestos may escape into the air at any given moment. But until that occurs, no legally cognizable tort has been committed.[16]

Neither does *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990), support Plaintiffs' position. In that

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[16] Plaintiffs suggest that the abnormal deterioration and fatigue cracks in the Tires are analogous to the first asbestos fiber escaping into the air. We disagree. There is no allegation by Plaintiffs that the fatigue cracks themselves affect the performance of the Tires, just as the presence of contained asbestos does not affect the safety of the air in the building. Rather, a tire's performance is not affected until it suffers a tread separation; it is this event that is analogous to the release of an asbestos fiber into the air.

case, the plaintiffs alleged that they were exposed to PCBs released into the environment by the defendants, and that as a result they suffered immune system damage that left them susceptible to a variety of illnesses, none of which they had yet contracted. The plaintiffs asserted that they were required to undergo medical monitoring so that if they ultimately did contract an illness as a result of their PCB exposure, it would be detected and treated as early as possible. The plaintiffs sought to recover the cost of that medical monitoring from the defendants. In determining that the "non-traditional tort" of medical monitoring did exist under Pennsylvania law, the court made clear that its holding was based upon a policy decision that plaintiffs who are exposed to toxic substances and must undergo medical surveillance as a result are entitled to a remedy. The court acknowledged the fact that traditional tort law would not provide such plaintiffs with a remedy, because they could not demonstrate the manifest injury usually required for a tort claim. Therefore, it was necessary for a new tort cause of action--one with the very narrow remedy of compensation for necessary medical monitoring--to be created in order to fill the void. Obviously, this narrow new tort is wholly inapplicable to Plaintiffs' claims in this case, and Plaintiffs' attempt to analogize their request for replacement tires to the remedy of medical monitoring is, while creative, ultimately unavailing.[17]

For the reasons set forth above, as to all Plaintiffs except Gustafson, Wehking, and Simpson, Plaintiffs' Thirteenth Claim for Relief is hereby **DISMISSED**, pursuant to Federal

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[17] Also unavailing is Plaintiffs' reliance on another medical monitoring case, *Barth v. Firestone Tire & Rubber Co.*, 661 F. Supp. 193 (N.D. Cal. 1987). In that case, the court accepted as true the plaintiff's allegation that he "has suffered a direct injury to his immune system" as a result of exposure to toxic substances. Therefore, the court determined that the plaintiff had asserted a present physical injury, sufficient to support a traditional tort claim.

Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief may be granted.

B. RICO Claims

Plaintiffs' claims asserted in their Second through Seventh Claims for Relief of the Master Complaint are based on the federal RICO Act. They allege on behalf of the Tire Class (Second Claim for Relief) and the Explorer Diminution Class (Third Claim for Relief) that defendants received income from a pattern of racketeering[18] and used or invested that income to operate and expand the enterprises defined in the Master Complaint,[19] all in violation of 18 U.S.C. § 1962(a). Master Complaint, PP 239, 266. On behalf of the Tire Class (Fourth Claim for Relief) and the Explorer Diminution Class (Fifth Claim for Relief), Plaintiffs allege that the defendants conducted and/or participated in the conduct of the affairs of the "enterprises" through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c). *Id.* at PP 274, 284. In Sixth Claim for Relief (on behalf of the Tire Class) and Seventh Claim for Relief (on behalf of the Explorer Diminution Class), Plaintiffs allege that Defendants conspired, in violation of 18 U.S.C. § 1962(d), to commit the aforementioned violations of sections 1962(a) and 1962(c). *Id.* at PP 291, 295.

In order to maintain a civil action for damages under any of these theories, 18 U.S.C. § 1964 requires that a plaintiff

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[18] Briefly stated, the "pattern of racketeering" described in the Master Complaint refers to Defendants' acts in furtherance of their alleged fraudulent scheme "to deceive the automotive buying and leasing public regarding the features, safety, quality, and value" of the Tires and Explorers. *Id.*

[19] The Master Complaint defines three enterprises: Ford and Firestone as an association-in-fact enterprise (the "Domestic Enterprise") (*id.* at P 211), and Ford, Firestone, and Bridgestone as an association-in-fact enterprise (the "International Enterprise") (*id.* at P 214), and the Bridgestone-Firestone Enterprise (*id.* at P 247).

plead and prove that he has been "injured in his business or property by reason of a violation of section 1962." Just as Defendants maintain that Plaintiffs have not pled a cognizable injury to support their negligence claims, they also argue that all of Plaintiffs' RICO claims must fail for lack of the requisite injury to business or property.

For each of the RICO claims asserted on behalf of the Tire Class, Plaintiffs allege that they have been injured because:

> they have been forced to bear the financial loss associated with the cost of replacing the Tires and/or the diminished value of their vehicles equipped with the Tires now that the truth regarding their safety and lack of roadworthiness is known. Plaintiffs and the Tire Class were also injured because Defendants withheld information about safety risks concerning the Tires which, if known, would have caused consumers not to buy or lease, or to pay substantially less for, the Tires or vehicles equipped with the Tires.

Master Complaint, PP 241, 278, and 292.[20] Plaintiffs further allege that Defendants' RICO violations have injured the Explorer Diminution Class because:

> they have been forced to bear the financial loss associated with the diminished value of their Explorers now that the truth regarding their safety and lack of roadworthiness is known. Plaintiffs and the Explorer Diminution Class were also injured because defendants withheld information about the safety risks concerning the Explorer which, if known, would have caused consumers not to pur-

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[20] Plaintiffs have employed slight, immaterial wording differences among the cited paragraphs.

chase or lease, or to pay substantially less for, Explorers.

Id. at PP 268, 288, and 296.[21]

The Master Complaint does not allege that those Plaintiffs who have replaced their tires did so as a result of their tires failing, nor does it allege that Plaintiffs suffered any pecuniary loss as the result of actual tire failure.[22] The Master Complaint also does not allege that any plaintiff has incurred an actual monetary loss as the result of the alleged diminished value of the Tires or Explorers by selling or attempting to sell them.

The nature of Plaintiffs' alleged RICO injuries are thus of two general but interdependent types. First, they claim that the Tires (or vehicles equipped with them) and Explorers are not worth what they paid for them or that they would not have bought them at all. In other words, their injury is the diminished value of their property. Second, Plaintiffs claim to have been injured because they have expended money--either in purchasing the Tires and/or Explorers or in replacing allegedly defective tires. We hold that these allegations do not satisfy the injury to business or property requirement of 18 U.S.C. § 1964.

Federal courts have consistently and repeatedly held that to satisfy the injury requirement of section 1964, a plaintiff must prove an actual, concrete monetary loss (i.e., an "out-

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[21] *See supra* note 20.

[22] The Court notes that a few individual plaintiffs have alleged that they incurred replacement costs following tread separation or tire "failures." Both the Master Complaint and Plaintiffs' brief make clear, however, that Plaintiffs have not based their claim of RICO injury on replacement following tire failure, nor have they requested relief on behalf of a class so defined. This portion of the Court's Order therefore does not apply to these individuals to the extent they may later choose to assert individual RICO claims based on replacement costs incurred.

of-pocket" loss). *See, e.g., In re Taxable Municipal Bond Securities Litigation*, 51 F.3d 518, 523 (5th Cir. 1995) (RICO claim dismissed for failure to show conclusive financial loss); *Steele v. Hospital Corp. of America*, 36 F.3d 69, 70-71 (9th Cir. 1994) (patients who had not paid out money as a result of alleged scheme that reduced their insurance benefits could not show required concrete financial loss); *Dornberger v. Metropolitan Life Ins.*, 961 F. Supp. 506, 521-22 (S.D.N.Y. 1997) (RICO injury requires showing of actual, out-of pocket financial loss). An injury that is speculative or contingent on future events that may or may not occur is insufficient to satisfy the injury requirement. *See, e.g., Imagineering v. Knighten Bros. Construction*, 976 F.2d 1303, 1310-11 (9th Cir. 1992) (RICO claim dismissed because alleged injury required speculation that other events would have occurred); *Lincoln House v. Dupre*, 903 F.2d 845, 847 (1st Cir. 1990) (allegation of RICO injury that is contingent on outcome of separate litigation is purely speculative and not ripe for resolution); *Hecht v. Commerce Clearing House*, 897 F.2d 21, 24 (2d Cir. 1990) (plaintiff's allegation that RICO violation would cause him to lose commissions in future too speculative to satisfy injury requirement); *Arabian American Oil. Co. v. Scarfone*, 713 F. Supp. 1420, 1421 (M.D. Fl. 1989) (speculation that injury might be inflicted is insufficient to state RICO claim); *Anitora Travel v. Lapian*, 677 F. Supp. 209, 216 (S.D.N.Y. 1988) (no RICO injury absent allegation of actual, present injury, rather than speculative injury that may only possibly occur in the future).

Guided by these principles, we turn to an examination of Plaintiffs' specific allegations of the injury caused by Defendants' RICO violations. As noted above, Plaintiffs allege, both on behalf of the Tire Class and the Explorer Diminution Class, that Defendants' fraudulent conduct induced them to purchase tires and/or vehicles that, because of their inherent defects, are of diminished value. They maintain that they have suffered an injury for which RICO provides a remedy

because they "paid inflated prices to buy or lease products the market has now devalued because their previously concealed design defects render them unsafe." Plaintiffs' Opposition at 43.[23] According to Plaintiffs, these diminished values, along with the "out-of-pocket costs Plaintiffs are paying to replace inherently defective tires," demonstrate that Plaintiffs "have already sustained real pecuniary losses." *Id.*

Despite their description of injury in the past tense, Plaintiffs' assertion of financial loss is grounded in the possibility of future events that may cause them to suffer the loss associated with the products they claim are defective or diminished in value: the tires that they have unilaterally replaced or may replace in the future may suffer tread separation; they may receive on trade-in or resale of their Explorers (or other vehicles equipped with the Tires) less than they would have received absent the alleged defects. As numerous appellate and district courts have held, however, RICO affords a monetary remedy only to plaintiffs who have actually realized the diminished value or experienced product failure, and not to those who allege a risk (or even a probability) of such loss.

In *Maio v. Aetna*, 221 F.3d 472 (3d Cir. 2000), the Third Circuit recently addressed a similar claim. The plaintiffs were insured members of an HMO plan provided by Aetna. They asserted RICO claims based primarily on the defendants' alleged fraudulent advertising about the quality and features of the HMO plan, maintaining that they were injured because the defendants actually maintained procedures and practices inconsistent with their advertising campaign. Specifically, the plaintiffs alleged that the defendants' RICO violations caused them to pay "more for their HMO plans than those plans were worth." *Id.* at 480.

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[23] Plaintiffs suggest that the diminished value is reflected in standard market guides such as the Kelly Blue Book. *Id.* at 45.

Relying on numerous RICO decisions requiring tangible financial loss, the Third Circuit rejected the plaintiffs' "overpayment" theory of RICO injury. The court held that:

> appellants cannot establish that they suffered a tangible economic harm compensable under RICO unless they allege that health care they received under Aetna's plan actually was compromised or diminished as a result of Aetna's management decisions challenged in the complaint . . . . There is no factual basis for appellants' conclusory allegation that they have been injured in their "property" because the health insurance they actually received was inferior and therefore "worth less" than what they paid for it.[24]

Id. at 488.[25] The Third Circuit's discussion of the plaintiffs' diminution in value theory is particularly instructive in this case:

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[24] The court went on to explain that the requisite actual losses would have to be alleged and proven on an individual basis. *Id.* at 488.

[25] Plaintiffs make much of the fact that the Third Circuit distinguished the "health care product" at issue, which it characterized as a contractual right to receive medical benefits, from property of a tangible nature. *See id.* at 488-89. That distinction was, in fact, only one of three independent grounds for the court's holding. The other two grounds, discussed below, are fully applicable here.

We note here also that one federal district court has recently refused to draw the distinction made by the *Maio* court to which Plaintiffs refer. In *In re Managed Care Litigation*, 150 F. Supp. 2d 1330, 2001 WL 660869 (S.D. Fl. 2001), the court found that the dichotomy drawn in Maio between tangible property interests and health care contracts that have not been breached was inappropriate because the insureds' claims were more like fraudulent inducement claims than claims for breach of contract. *Id.* at *4-5. The court did not expressly address the other bases for the *Maio* court's ruling and it declined to address at that juncture whether the evidence would support the plaintiffs' allegation of injury. *Id.* at *6.

> We also reject appellants' theory of RICO injury resting on the purported diminution in product value because, . . . as a matter of simple logic, they obviously cannot show that they actually received something "inferior" and "worth less" absent individualized allegations concerning the quantity and quality of health care benefits Aetna provided under its HMO plan. Put differently, assuming *arguendo* that the injury claimed is predicated solely on the alleged financial loss of premium dollars stemming from appellants' purchase of an "inferior health care product," the harm alleged, *i.e.*, overpayment, cannot exist absent proof of some level of inferior treatment under Aetna's HMO plan.
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> Rather, the occurrence of an injury-causing event such as, for example, a denial of adequate care or a delay in treatment is viewed more appropriately as the contingency upon which appellants' economic damages are dependent. In other words, allegations of the foregoing nature are necessary to provide the factual basis for appellants' otherwise conclusory allegation that they have been injured in their "property" because they overpaid for Aetna's inferior health care product.

Id. at 492-94.

Like the HMO enrollees in *Maio* who alleged they had overpaid for an inferior product, Plaintiffs here have not suffered cognizable RICO injury by virtue of their purchases of the Tires or Explorers, absent particularized allegations of the inferior performance of those products. The actual failure of the Tires or Explorers, like the failure of the HMO plans to provide the quality care advertised, is a contingency upon which Plaintiffs' economic damages are dependent.

The *Maio* court also found the plaintiffs' theory of RICO injury untenable because it was predicated on the conclusion that the economic value of the product purchased was reduced because of the *possibility* that the alleged inferiority of the product would manifest itself at some point in the future, just as Plaintiffs here allege that the possibility of tire or vehicle failure reduces their property's value or necessitates replacement. The court rejected the notion that present economic harm has been alleged when it "necessarily is contingent upon the impact of events in the future which have not yet occurred." *Id.* at 494-95. That theory, the court held, requires impermissible factual speculation about events that may not occur and would "expand[] the concept of RICO injury beyond the boundaries of reason." *Id.* at 496.

Similarly, in *First Nationwide Bank v. Gelt Funding*, 27 F.3d 763 (2d Cir. 1994), the Second Circuit upheld the dismissal of RICO claims because the plaintiff had not yet incurred an actual injury. The plaintiff bank claimed that the defendants had fraudulently induced it to make non-recourse loans by misrepresenting the value of the properties pledged as collateral. The bank was injured, it alleged, because it had lent more funds than it would have had it known the true value of the collateral and was thus undersecured for the excess amounts. The bank also alleged injury as a result of having to increase its reserves to cover the potential risk of the borrowers' default. The bank did not allege, however, that the fraudulently induced loans were in default or that it had had to foreclose on the insufficient collateral. *Id.* at 766-67.

The Second Circuit noted that, under the bank's theory, it would have been injured even if the loans were ultimately repaid in full with interest, *id.* at 767-68, just as Plaintiffs in this case would recover under their theory even if their tires and/or Explorers perform without failure throughout their normal useful life and even if they never actually lose money by selling them. Nevertheless, the *Gelt* plaintiff argued that it

suffered an "immediate quantifiable injury when the loans were made because . . . [it] assumed additional risk of loss, and 'for all practical purposes the[ ] additional funds were lost the moment the loans were made.'" *Id.* at 768. That argument, nearly identical to the argument of Plaintiffs here that they sustained a monetary injury as soon as they purchased the Tires and/or Explorers, or "as soon as the rubber hit the road," did not persuade the Second Circuit:

> We reject FNB's novel theory that it was damaged simply by being undersecured when, with respect to those loans not yet foreclosed, the actual damages it will suffer, if any, are yet to be determined.[26]

Id.

The failure to allege the plaintiff's actual realization of her property's diminished value led to dismissal of the RICO

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[26] The holding in *Gelt* illustrates the distinction between an unrealized (even if theoretically demonstrable) diminution in value from the type of actual, concrete injury required by 18 U.S.C. § 1964. We are aware, just as the Second Circuit was undoubtedly aware, that the secondary market for commercial paper might have placed a value on the subject loans determined in part by the actual value of the collateral and that it might have been possible to quantify the diminution in value attributable to the inadequacy of the collateral. Similarly here, Plaintiffs maintain that they can show diminution in a generalized manner by reference to standard market guides, and we accept that assertion for purposes of this motion. However, diminished value as a commercial concept is plainly not a RICO injury unless and until a plaintiff actually realizes a loss occasioned by it. The wisdom of that requirement was recognized by the Second Circuit. The lender in *Gelt* may, for example, have held onto the loans, betting against default and foreclosure, and hence, not have suffered a concrete monetary loss at all, just as a Tire or Explorer owner may bet against failure and never realize an actual loss. (Whether it is prudent for an owner to take what Plaintiffs would assert is a significant risk is not the issue, and Plaintiffs wisely do not argue that increased risk constitutes a RICO injury. *See, e.g., Dornberger*, 961 F. Supp. at 522 (increased risk not a RICO injury) (citing several authorities)).

claims asserted in *Oscar v. University Students Co-Operative Ass'n*, 965 F.2d 783 (9th Cir. 1992) (*en banc*). The plaintiff, a tenant in an apartment building, brought a RICO action against the owner and tenants of a neighboring apartment building. She claimed that the illegal conduct of her neighbors had decreased the value of her property. The Ninth Circuit upheld the district court's dismissal of her RICO claim because she did not allege that she had ever sublet or tried to sublet her apartment, or "even that she ever wished or intended to sublet the apartment." Her alleged loss was, according to the Ninth Circuit, "therefore purely speculative." *Id.* at 787.[27] *See also Pelfresne v. Village of Rosemont*, 22 F. Supp. 2d 756, 765 (N.D. Ill. 1998) (allegation that plaintiff would lose the fair market value of his property in the future insufficient to support RICO claim).

Substantial support for our conclusion that Plaintiffs' diminished value theory does not satisfy the requirements of section 1964 can also be found in a recent unpublished decision of the District of Columbia district court. In *Tri-State Express v. Cummins Engine*, Civ. A. 99-00220 (HHK) (D.D.C. September 11, 2000), the court dismissed the RICO claims of truck owners who alleged that they had been injured because the defendants' conduct had "reduced the present economic value" of their trucks and engines. *Id.*, slip op. at 6. Relying, as we have, on *Maio*, *Gelt*, and *Steele*, the court held that the plaintiffs had not alleged any realized, concrete injury as a result of the alleged defects, "but only the potential for harm," and that the speculative or future in-

[27] The court also based its holding on its unwillingness to treat the plaintiff's property interest as a renter the same as that of an owner of real property, finding her injury to be more in the nature of personal discomfort or annoyance, which is not compensable under RICO. *See* 965 F.2d at 786-87.

juries suggested by the plaintiffs were "insufficient to activate RICO's remedial scheme." *Id.*, slip op. at 13-14.[28]

The principle that emerges from all of the decisions discussed above is that a plaintiff alleges a cognizable injury (one that is concrete, tangible, and not speculative or contingent) as a result of a purchase only where the diminished value of the plaintiff's property has actually been realized or when the alleged infirmity in the purchased property has otherwise tangibly manifested itself. For this reason, Plaintiffs' allegations that they paid more for the Tires and Explorers than they are worth, or that they have incurred or will incur the cost of replacing Tires that have never manifested the alleged defect, are insufficient to sustain their RICO claims.[29]

None of the RICO decisions cited by Plaintiffs counsels a different conclusion.[30] The court in *Kaushal v. State Bank of*

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[28] Plaintiffs' attempt to distinguish this holding (*see* Plaintiffs' Opposition at 52-53) is unavailing. Nothing in that court's analysis suggests that it based its conclusion regarding the lack of RICO injury on the existence of a consent decree, the likelihood of fines, or the assertion that only the environment, and not the plaintiffs, suffered injury related to the higher emission levels at issue.

[29] We take judicial notice of the fact that in late May of this year, Ford announced that it would replace many, if not most, of the tires that are the subject of the Master Complaint and would reimburse certain owners who had already replaced tires at their own expense. The diminution in value and replacement costs alleged as injury to the Tire Class may, therefore, never be realized for this reason alone. Although we in no way base our holding on this fact because it is outside the pleadings (nor do we suggest that these costs or associated costs alleged in the Master Complaint cannot be recoverable under any theory), it does illustrate a purpose of RICO's requirement that the injury alleged be concrete and not speculative or contingent.

[30] Some of them do not even address the injury issue, likely because the allegation of present injury was plainly sufficient. In *Emery v. American General Finance*, 71 F.3d 1343 (7th Cir. 1995), for example, the plaintiff alleged that she had paid and was continuing to pay more for

India, 1988 U.S. Dist. LEXIS 11988 (N.D.Ill. 1988), addressed the RICO injury requirement in the context of a purchase of a business. The plaintiffs alleged that they were induced by fraud to purchase a company that had concealed debt--non-contingent liability--that had produced an immediate, quantifiable loss. *Id.* at *8. *See also Grove Holding v. First Wisconsin Nat'l Bank*, 803 F. Supp. 1486, 1509 (E.D. Wis. 1992) (RICO injury where plaintiffs had purchased company, the assets and liabilities of which had been misrepresented). In the remaining decisions cited by Plaintiffs, the courts found the injury requirement to have been met because the monetary loss had already been incurred or the infirmity in the product purchased had already manifested itself. *See Lentz v. Pan American*, 1991 U.S. Dist. LEXIS 16445 (E.D. Pa. 1991) (plaintiff purchased security services he did not receive); *In re Synthroid Marketing Litigation*, 188 F.R.D. 295 (N.D. Ill. 1999) (loss occurred upon pur-

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credit than she would have paid had the defendant not engaged in fraudulent "loan flipping." As the Seventh Circuit noted, the plaintiff had paid $ 1200 to borrow $ 200, or roughly three times what she would have paid absent the alleged fraudulent conduct. *Id.* at 1345-46. Unlike this case, no speculation was necessary to make this calculation, and her out-of-pocket loss awaited the occurrence of no contingency. *SK Hand Tool v. Dresser Industries*, 852 F.2d 936 (7th Cir. 1988), also does not specifically address the injury requirement. Rather, the court dismissed the RICO claims for failure to allege the required pattern of racketeering activity. *Id.* at 940-43. In any event, the allegation of injury in *SK Hand Tool* was of a present, non-contingent loss premised on the plaintiff's purchase of a business as to which the defendants had concealed liabilities and misrepresented the inventory. *Id.* at 938. On the day the plaintiff purchased the business, therefore, it received more liabilities and less inventory than it had paid for. The buyer's loss was immediate because it did not depend on any future contingency. In *Line v. Astro Manufacturing*, 993 F. Supp. 1033 (E.D. Ky. 1998), the court also did not reach the issue presented here. The court merely held that the plaintiffs had not alleged a RICO injury because the houses they had purchased were not worth less than what the plaintiffs had paid for them. The court therefore had no reason to (and did not) opine on the point at which non-existent damages might have accrued. *See id.* at 1037.

chase; not dependent on any future event); *In re Merrill Lynch Limited Partnerships Litigation*, 7 F. Supp. 2d 256 (S.D.N.Y. 1997) (plaintiffs' injuries not speculative because allegation was that limited partnerships purchased could, at point of their purchase, never achieve their promised objectives). The allegations of RICO injury in this case are very different from the allegations made in the cases Plaintiffs rely upon. Whether Plaintiffs received what they allege they paid for (tires and vehicles that perform as warranted) is contingent on future events that may or may not occur.

One decision cited by Plaintiffs, *In re Cordis*, 1992 U.S. Dist. LEXIS 22612, 1992 WL 754061 (S.D. Ohio 1992), does appear to lend support to Plaintiffs' position that they can recover under RICO for diminished value and replacement costs. In that case, the district court found that the plaintiffs who alleged they had purchased faulty pacemakers had adequately alleged an injury under section 1964 for "the diminished value of the product and the costs associated with implanting and explanting the product." *Id.* at *3. In reaching this conclusion, the court drew analogies to recoveries by purchasers in the antitrust and securities fraud contexts and found no basis for "a principled distinction" between those purchasers and the purchasers of the allegedly defective pacemakers. *Id. Cordis* is distinguishable from this case on two grounds. First, it is not entirely clear that the *Cordis* court assumed that any contingency was involved, i.e., whether the plaintiffs' pacemakers would ultimately be removed and replaced. Second, the court dismissed the plaintiffs' RICO claims for failure to allege an enterprise, so its discussion of injury was not necessary to its judgment.

Notwithstanding these distinctions, one could plausibly conclude that the result we reach here cannot fairly be harmonized with the analysis employed in *Cordis*. If that is so, we decline to follow *Cordis*. First, as noted above, the weight of authority on the issue presented is decidedly con-

trary to the analysis of *Cordis*. Moreover, because *Cordis* was decided in 1992, the court did not have the benefit of this weight of authority, including the Third Circuit's decision on in *Maio*, the Second Circuit's decision in *Gelt*, and the Ninth Circuit's decisions in *Oscar* and *Steele*. Second, we *do* see the basis for a principled distinction between the losses alleged by Plaintiffs here and the purchase loss of a plaintiff in the antitrust or securities fraud context. Although the *nature* of the injury to business or property required by the RICO Act does not differ appreciably from the nature of the injury required to sustain an antitrust or securities fraud claim, the *accrual* of the injury may differ based on the facts alleged and the legal theory employed.[31]

For all the reasons stated above, we hold that Plaintiffs have not alleged an injury cognizable under 18 U.S.C. § 1964. The Second through Seventh Claims for Relief of the Master Complaint are thus hereby **DISMISSED**.

C. Claims under Consumer Protection Statutes

In their Tenth Claim for Relief, entitled "Violation of All States' Consumer Protection Statutes," Plaintiffs allege the following:

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[31] An antitrust plaintiff who purchases a good at a price inflated by virtue of the defendant's anticompetitive conduct generally is injured at the point of purchase. If, for example, she has paid three dollars for a good that, but for the antitrust violation, would have cost two dollars, she has been injured at the moment of purchase and no future contingency (such as the sale or replacement of the good or the failure of the good) must occur before she actually has sustained an out-of-pocket loss. Similarly, a plaintiff who has purchased a security in reliance on material misrepresentations sustains a present loss not contingent on any future event. As the cases in the preceding discussion involving the purchase of a business illustrate, the purchaser of a company (including a purchaser of securities) immediately incurs a loss when the company's assets and liabilities have been misrepresented, because what the purchaser has or has not received is not dependent on any future event.

308. [Defendants] engaged in unfair competition or unfair or deceptive acts or practices in violation of any and all state consumer protection statutes when they represented, through their advertising, warranties, and other express representations, that the Tires and Explorers had benefits or characteristics that they did not actually have. [Defendants] further violated state consumer protection statutes when they falsely represented that the Tires and Explorers were of a particular standard or quality when they were not. Finally, [Defendants] violated state consumer protection statutes when they advertised the Tires and Explorers with the intent not to sell them as advertised, and when, in so doing, they concealed and suppressed facts material to the true characteristics, standards, and quality of these products.

309. [Defendants'] deceptive practices were specifically designed to induce Plaintiffs and the Classes to buy the Tires and Explorers.

310. To this day, [Defendants] continue to engage in unlawful practices in violation of state consumer protection statutes.

311. As a direct and proximate result of [Defendants'] unfair methods of competition and unfair or deceptive acts or practices, Plaintiffs and the Classes have suffered actual damages and members of the Classes are threatened with irreparable harm by undue risk of physical injuries or death.

In short, Plaintiffs allege the basic components of a consumer protection claim-unfair or deceptive acts or practices, committed in the pursuit of trade or commerce, which result in loss.

As in their arguments for dismissing the negligence and RICO claims, Defendants contend that all Plaintiffs except those who have suffered a tread separation fail to state a claim because they do not plead injury. Reply Brief III at 13-14. Defendants' argument, though successful to defeat Plaintiffs' negligence and RICO claims, is unconvincing in the realm of consumer protection claims. Rather than injury, as required for RICO or negligence claims, to state a consumer protection cause of action, Plaintiffs need plead only "loss." The TCPA provides that "any person who suffers an *ascertainable loss* of money or property . . . as a result . . . of an unfair or deceptive act or practice . . . may bring an action individually to recover actual damages." Tenn. Code Ann. § 47-18-109(a)(1) (emphasis added). The MCPA similarly sets forth a claim for the greater of actual damages or $ 250.00 for "[a] person who suffers *loss* as a result of a violation of this act." Mich. Comp. Laws § 445.911(b)(2) (emphasis added).[32]

Defendants argue that Plaintiffs cannot recover under the relevant consumer protection statutes because they "have not alleged that they experienced any manifestation of the alleged defect or injury." Brief III at 3. Courts interpreting the terms "ascertainable loss" and "loss" in consumer protection statutes disagree. For instance, in *Hinchliffe v. American Motors Corp.*, 440 A.2d 810, 813-14 (Conn. 1981), the Supreme Court of Connecticut interpreted the term "ascertainable loss" in the Connecticut Unfair Trade Practices Act ("CUTPA"), ruling that a consumer who had bought a vehi-

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[32] While the MCPA refers to "loss," Mich. Comp. Laws § 445.911(b)(2), and the TCPA refers to "ascertainable loss," Tenn. Code Ann. § 47-18-109(a)(1), the Court sees no reason to interpret the two terms differently in determining whether Plaintiffs have stated a claim under the relevant state consumer protection statutes. *See Miller v. American Family Publishers*, 663 A.2d 643, 655 n.10 (N.J. Super. Ct. Ch. Div. 1995) (finding no significant difference between "loss" and "ascertainable loss").

cle advertised as "full-time four-wheel drive" but was actually equipped with a "limited slip differential mechanism" suffered a loss under CUTPA. In so ruling, the Court reasoned that "whenever a consumer has received something other than what he bargained for, he has suffered a loss of money or property." 440 A.2d at 814. Here, Plaintiffs allege, among other claims, that they expected to receive Tires and Explorers "of a particular standard or quality" but actually received Tires and Explorers of a lower standard or quality. Master Complaint, P 308. Such an allegation is a classic example of "receiving something other than what [they] bargained for." *See Hinchliffe*, 440 A.2d at 814. Furthermore, unlike with RICO claims, this alleged diminution in value satisfies the loss requirement. *Compare Maio*, 221 F.3d at 492 ("We also reject appellants' theory of RICO injury resting on the purported diminution in value because, . . . as a matter of simple logic, they obviously cannot show that they actually received something 'inferior' and 'worth less' absent individualized allegations concerning the quantity and quality of health care benefits Aetna provided under its HMO plan.") with *Hinchliffe*, 440 A.2d at 814 ("Obviously such diminution [in value] would satisfy the statute.").

The Court views as convincing this interpretation of the New Jersey and Connecticut consumer protection statutes and concludes that the interpretation is equally applicable to the TCPA and the MCPA. In fact, a claim quite similar to Plaintiffs' claim has been specifically recognized by the Court of Appeals of Michigan. In *Mayhall v. A.H. Pond Co., Inc.*, 341 N.W.2d 268, 271-72 (Mich. Ct. App. 1983), the court ruled that the plaintiff stated a "loss" under the MCPA when he alleged that the diamond ring he purchased was advertised as "guaranteed perfect" but actually was flawed. The Michigan court reasoned that "the injury suffered by a victim of fraud [is failure to] receive what he expected to receive." 341 N.W.2d at 271. Loss, under a consumer protection claim, can arise from the "frustration of [the plaintiff's] ex-

pectations," as created by the defendant. *Id.* This aspect of consumer protection claims also distinguishes them from RICO claims. Because the loss in a consumer protection claim can arise solely from receiving something *different from*, rather than *less than*, what was represented to the plaintiff, the contingency of the alleged loss is not a barrier to stating a claim here as it is in the RICO context. *See also Hinchliffe*, 440 A.2d at 814 ("To the consumer who wishes to purchase an energy saving compact, for example, it is no answer to say that he should be more satisfied with a more valuable gas guzzler.").

Finally, it is of no consequence that most Plaintiffs have not alleged that they tried to sell, trade in, or replace their Tires or Explorers. The court in *Mayhall*, 341 N.W.2d at 270, addressed whether an injury to the plaintiff's pocketbook was necessary to state a claim and found that it was not required. Plaintiffs need not allege that they ever tried to sell or trade in their tires or vehicles or that they experienced tread separation in order to state a loss.

Because the TCPA and the MCPA require only that Plaintiffs allege a loss, and Plaintiffs have do so, Plaintiffs' claim for violation of state consumer protection statutes will not be dismissed for failure to allege manifest injury.

D. Claims for Breach of Implied Warranty

In their Twelfth Claim for Relief, entitled Breach of Implied Warranty, Plaintiffs allege the following:

> 320. [Defendants] impliedly warrant that the Tires and Explorers, which they designed, manufactured and sold to Plaintiffs and the Classes, pass without objection in the trade, are fit and merchantable for their ordinary use, are not otherwise injurious to consumers, and are adequately contained, packaged and labeled.

> 321. Because of the undisclosed unreasonably dangerous propensity of the Tires to experience a sudden and substantial tread separation, the Tires cannot pass without objection in the trade, are unsafe, unmerchantable, and unfit for their ordinary use when sold, are not adequately contained, packaged and labeled, and threaten injury to Plaintiffs and members of the Classes.
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> 322. Because of the undisclosed unreasonably dangerous propensity of the Explorers to roll over, the Explorers cannot pass without objection in the trade, are unsafe, unmerchantable, and unfit for their ordinary use when sold, are not adequately contained, packaged and labeled, and threaten injury to Plaintiffs and members of the Classes.
>
> 323. As a direct and proximate result of [Defendants'] breach of implied warranty, Plaintiffs and the Classes have suffered actual damages and members of the Classes are threatened with irreparable harm by undue risk of physical injuries and death.

In other words, Plaintiffs allege that each Defendant has breached the implied warranty of merchantability by selling, respectively, defective Tires and Explorers.

Both Michigan and Tennessee have adopted Uniform Commercial Code § 2-314, the section that establishes an implied warranty of merchantability in the sales of goods by merchants. *See* Mich. Comp. Laws § 440.2314; Tenn. Code Ann. § 47-2-314.[33] Defendants argue that Plaintiffs may not maintain an action for breach of the implied warranty of merchantability for the same reason that their negligence and

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[33] Both states also have adopted the correlating section relating to leases, U.C.C. § 2A-212. *See* Mich. Comp. Laws § 440.2862; Tenn. Code Ann. § 47-2A-212.

RICO claims fail: they do not allege that they have suffered any manifest injury. However, U.C.C. § 2-725(2), which also has been adopted by both Tennessee and Michigan, expressly provides otherwise:

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods[34] and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Mich. Comp. Laws § 440.2725(2); Tenn. Code Ann. § 47-2-725(2). "Accrue" is defined as "to come into existence as a claim that is legally enforceable." *American Heritage Dictionary* (3d Ed. 1992); *see also Black's Law Dictionary* (5th Ed. 1979) ("A cause of action 'accrues' when a suit may be maintained thereon."). Therefore, by the plain language of the statute, each Plaintiff's cause of action for breach of implied warranty accrued at the time he or she purchased an

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[34] This exception does not apply to implied warranties. *See* Hawkland, *Uniform Commercial Code Series* § 2-725:02 (1994 ed.) ("By definition, an implied warranty is not explicit, and, therefore, the exception has no application to implied warranties. Stated differently, the statute of limitations will always start to run against claims based on implied warranty from the time when delivery of the goods is tendered."); *accord Antz v. GAF Materials Corp.*, 719 A.2d 758, 760 (Pa. Super. Ct. 1998); *Washington Freightliner, Inc. v. Shantytown Pier, Inc.*, 719 A.2d 541, 545 (Md. 1998); *Cosman v. Ford Motor Co.*, 674 N.E.2d 61, 66 (Ill. App. Ct. 1996); *Champion Home Builders, Inc. v. Hodge*, 602 So. 2d 399, 400 (Ala. 1992); *Huff v. Hobgood*, 549 So. 2d 951, 954 (Miss. 1989); *American Alloy Steel, Inc. v. Armco, Inc.*, 777 S.W.2d 173, 176 (Tex. App. 1989); *Armour v. Alaska Power Auth.*, 765 P.2d 1372, 1375 (Alaska 1988); *Dickerson v. Mountain View Equip. Co.*, 1710 P.2d 621, 625 (Idaho Ct. App. 1985); *Voth v. Chrysler Motor Corp.*, 545 P.2d 371, 378 (Kan. 1976).

Explorer (as to Ford) or one or more of the Tires (or a vehicle equipped with the Tires) (as to Firestone), and there is no requirement that Plaintiffs demonstrate any injury to their person or property as a result of the breach, but only that they purchased an unmerchantable product.[35]

We are cognizant of the fact that numerous courts have suggested otherwise.[36] *See, e.g., Briehl v. General Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999) (holding, without distinguishing between tort and warranty claims, that "since the Plaintiffs have failed to allege any manifest defect and their vehicles perform in a satisfactory manner," the complaint must be dismissed); *Jarman v. United Indus. Corp.*, 98 F. Supp. 2d 757, 768 (S.D. Miss. 2000) (no warranty claim "unless there is actually a failure in product performance"; "mere suspicion of a lost bargain . . . will not support an award of damages"); *In re Air Bag Prods. Liab. Lit.*, 7 F. Supp. 2d at 805 (citation omitted) (in either tort or breach of implied warranty of merchantability claim, there is no cause of action "until there is actual loss or damage"); *Yost v. Gen-*

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[35] The Court does not in this discussion consider whether Plaintiffs can satisfy the other elements required for recovery on a breach of implied warranty claim, only whether they are required to plead manifest injury. Defendants' arguments regarding the other necessary elements are discussed below.

[36] The Court also recognizes the Michigan Supreme Court's statement that "under the common law of products liability, in an action against the manufacturer of a product based upon an alleged defect in its design, 'breach of implied warranty and negligence involve identical evidence and require proof of exactly the same elements.'" *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 186 (Mich. 1984) (citation omitted). However, neither that case nor any other Michigan case that we have found dealt with the question of whether injury is required to maintain a breach of implied warranty action. Rather, the Michigan Supreme Court's language can best be read as applying to those cases involving personal injury or property damage; in other words, cases involving injury from a defective product, whether under a tort or implied warranty theory, involve the same elements.

eral Motors Corp., 651 F. Supp. 656 (D.N.J. 1986) (damage is a necessary element of breach of warranty claim); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 602-03 (S.D.N.Y. 1982) (as to implied warranty claim, rejecting argument that "the purchase of a defective tire, ipso facto, caused economic loss" because tires in question "lived full, productive lives"); *Weaver*, 172 F.R.D. at 96 (finding damages an essential element of breach of warranty, so that plaintiff who alleged defect in child seat but who had not experienced any problem with his child seat had no cause of action); *Bravman*, 794 F. Supp. at 99 (citation omitted) (finding that "consumer claims sounding in tort or breach of implied warranty are substantively the same, requiring the same elements of proof," and both require injury); *but see Rivera v. Wyeth-Ayerst Labs.*, 121 F. Supp. 2d 614 (S.D. Tex. 2000) (plaintiffs who took drug that was withdrawn from the market due to risk of liver damage had properly asserted breach of implied warranty of merchantability claim for purchase price of drug even though they themselves had suffered no liver damage or other health problems); *Microsoft Corp. v. Manning*, 914 S.W.2d 602 (Tex. App. 1995) (buyer of defective software program has warranty action even if he never suffers data loss as a result of the defect because buyer did not get what he bargained for). While couched in terms of whether manifest injury must be pled, the real ground for dismissing most of the cases cited above that are contrary to our conclusion on this point was that the defective products that the plaintiffs had purchased performed satisfactorily throughout their useful life, and therefore the plaintiffs had reaped the benefit of their bargain. That is simply another way of saying that the products were, in fact, merchantable, and therefore there was no breach of warranty. However, if Plaintiffs in this case ultimately can demonstrate that their Tires or Explorers were not merchantable at the time of purchase, they will not be required also to demonstrate that the

Tires or Explorers have malfunctioned in order to maintain a breach of implied warranty claim.

As explained above, to recover under their warranty claims, Plaintiffs need only allege and prove that the Tires or Explorers are *defective*. They are not required to allege and prove the same manifestation of defect necessary to sustain negligence and RICO claims. Defendants' argument assumes that the only way Plaintiffs can prove that Tires are defective is by tread separation and that they only way Plaintiffs can prove that the Explorers are defective is by an active roll-over incident. However, this is a factual assumption that is inappropriate for the Court to embrace in ruling on a motion to dismiss. Plaintiffs allege that the Tires and the Explorers are defective, and as Defendants cannot demonstrate as a matter of law that they are not, we shall assume for purposes of this motion that they are. Therefore, Plaintiffs' claim for breach of implied warranty of merchantability will not be dismissed for failure to allege manifest injury.[37]

E. Claims for Breach of Express Warranty

In their Eleventh Claim for Relief, entitled Breach of Express Warranty, Plaintiffs allege that Defendants "expressly warrant the Tires and Explorers to be free of defects at the time of delivery, which warranties are express warranties within the meaning of section 2-313 of the Uniform Commercial Code" and that Defendants "breached their express warranties by offering for sale, and selling as safe, Tires and

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[37] The Tennessee courts have expressly recognized in other contexts the distinction between a tort action and a breach of warranty action. For example, in *McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487 (Tenn. 1975), the plaintiffs brought a personal injury and wrongful death claim against a furnace manufacturer. The court held that the plaintiffs' tort and product liability claims accrued at the time the furnace malfunctioned and caused the plaintiffs' injuries; however, the plaintiffs' breach of warranty claims accrued at the time the defendant tendered delivery of the furnace.

Explorers that are, by design, defective in that they are unreasonably dangerous and likely to cause serious injury or death." Master Complaint, PP 314-15. Plaintiffs further allege that as a proximate result of Defendants' breach of the express warranty, Plaintiffs have "suffered actual damages and . . . are threatened with irreparable harm by undue risk of physical injuries or death." *Id.* at P 316. Inasmuch as U.C.C. § 2-725(2) applies to express warranty claims as well as implied warranty claims, and Plaintiffs expressly plead that the express warranty applied to the Tires and Explorers "at the time of delivery," the same analysis applies to both claims. Accordingly, Plaintiffs' express warranty claims are not subject to dismissal for failure to plead manifest injury.[38]

F. Magnuson-Moss Warranty Act Claims

In their First Claim for Relief, entitled Magnuson-Moss Warranty Act, Plaintiffs assert a claim under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(1) ("the Act"), which provides, in relevant part:

> Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief.

Plaintiffs' claim under the Act is based solely on Defendants' alleged breach of express and implied warranties as set forth in their Eleventh and Twelfth Claims for Relief. Plaintiffs assert that "as a direct and proximate cause of [Defendants'] breaches of express and implied warranties,

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[38] As with the implied warranty claims, Defendants raise a myriad of other reasons why Plaintiffs' express warranty claims should be dismissed; these arguments are addressed below.

[Plaintiffs] have suffered actual economic damages, and are threatened with irreparable harm by undue risk of physical injuries or death." Master Complaint, P 208.

Defendants argue that Plaintiffs cannot show that they have been "damaged" by any breach of warranty, and therefore they cannot maintain an action under the Act. However, Plaintiffs clearly have alleged that they are damaged by the fact that the Tires and Explorers that they purchased are defective, because they paid for non-defective tires and vehicles. As explained in the preceding sections, this is all Plaintiffs are required to allege to maintain an action for breach of warranty under state law. There is absolutely nothing in the Act that suggests any additional requirement under the Act. Indeed, the legislative history of the Act suggests that this is the prototypical type of damage for which the Act was designed to provide a remedy. On this issue, the court's discussion in *Gorman v. Saf-T-Mate, Inc.*, 513 F. Supp. 1028, 1033 (N.D. Ind. 1981), is instructive:

> [The Act's] central purpose is to create a new and more effective remedial mechanism for consumer claims involving comparatively small amounts of damages. Congress obviously felt that most aggrieved consumers go without redress because their individual claims are too insignificant to command representation by counsel or to warrant all the other expenses of invoking the judicial process. "Because enforcement of the warranty through the courts is prohibitively expensive, there exists no currently available remedy for consumers to enforce warranty obligations." S. Rep. No. 93-151, 93d Cong., 1st Sess. 7 (1973). Congress was also of the view that existing federal and state court procedural requirements offered too many impediments to the maintenance of consumer class actions. *See* H.R. Rep. No. 93-

1107, 93d Cong., 2d Sess., reprinted in (1974) U.S. Code Cong. & Ad. News 7702, 7724 (criticizing requirement of individual notice to potential class members). Accordingly, Congress sought to advance the federal policies expressed in the Warranty Act by fashioning a remedial mechanism for small consumer claims. The court is authorized to award a reasonable sum to defray costs and attorney fees as part of a judgment in favor of a consumer. 15 U.S.C. § 2310(d)(2). This feature obviously was designed primarily for the benefit of consumers having small damage claims. In addition, contrary to the general rule in diversity actions, claims of joined plaintiffs, including members of a plaintiff class, may be aggregated to satisfy the $ 50,000 federal court jurisdictional amount, as long as each member of the plaintiff class is claiming at least $ 25. Id. § 2310(d)(3). The provision allowing aggregation of such small claims is yet another indication that the cause of action provision contemplates rather small damage claims. While the provisions for attorney fees and federal court class actions are the most readily apparent clues to the purposes of the cause-of-action provision, there is also some highly corroborative evidence in the report of the House Commerce Committee: "In this context, your Committee would emphasize that this section (2310(d)) is remedial in nature and is designed to facilitate relief which would otherwise not be available as a practical matter for individual consumers." H.R.Rep. No. 93-1107, 93d Cong., 2d Sess., reprinted in (1974) U.S.Code Cong. & Ad. News 7702, 7724. There is only one variety of consumer complaint for which relief "would otherwise not be available," and that is the

> small warranty claim seeking repair, replacement or refund. That is the only kind of claim where the amount in controversy is ordinarily so small that individual private enforcement in the courts is "prohibitively expensive."[39]

In other words, the Act was created, at least in large part, to provide a federal cause of action for consumers saddled with defective products who otherwise would not have suffered sufficient monetary damage to justify bringing a lawsuit, and therefore may not have had a remedy when their warrantor refused to honor the warranty by repairing or replacing the product or refunding the purchase price. That is precisely the position in which Plaintiffs allege they find themselves, and in spite of the cases that suggest otherwise,[40] their claims under the Act are not subject to dismissal because they have suffered no injury beyond not getting the non-defective product for which they paid.

G. Unjust Enrichment Claims

Finally, in their ninth claim for relief, entitled Restitution/Disgorgement for Unjust Enrichment, Plaintiffs allege the following:

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[39] The specific issue the *Gorman* court addressed was whether claims for personal injury caused by breach of warranty may be brought under the Act. The court held that they may not, *Gorman*, 513 F. Supp. at 1035, although perplexingly Defendants cite this case for the proposition that an allegation of personal injury and/or damages is required under the Act. *See* Brief III at 60. Numerous cases have agreed with the holding in *Gorman*. *See, e.g., Boelens v. Redman Homes, Inc.*, 748 F.2d 1058 (5th Cir. 1984); *Bush v. American Motors Sales Corp.*, 575 F. Supp. 1581 (D. Colo. 1984); *Hughes v. Segal Enterprises, Inc.*, 627 F. Supp. 1231 (W.D. Ark. 1986); *Schomber v. Jewel Cos., Inc.*, 614 F. Supp. 210 (N.D. Ill. 1985).

[40] *See Coghlan v. Aquasport Marine Corp.*, 73 F. Supp. 2d 769 (S.D. Tex. 1999), aff'd, 240 F.3d 449 (5th Cir. 2001); *Verb v. Motorola, Inc.*, 672 N.E.2d 1287, 1295 (1996); *Feinstein*, 535 F. Supp. at 602.

304. As the intended and expected result of their conscious wrongdoing, Defendants have profited and benefitted from the purchase and leasing of Ford Explorers by the Explorer Diminution Class, and the purchase of Tires, and the purchase and leasing of vehicles equipped with the Tires, by the Tire Plaintiffs and the Tire Class.

305. Defendants have voluntarily accepted and retained these profits and benefits, derived from the Plaintiffs and the Plaintiff Classes, with full knowledge and awareness that, as a result of Defendants' fraud and other conscious and intentional wrongdoing, Plaintiffs and the Plaintiff Classes were not receiving products of the quality, nature, fitness, or value that had been represented by Defendants or that Plaintiffs and the Plaintiff Classes, as reasonable consumers, expected.

306. By virtue of the conscious wrongdoing alleged in this Complaint, Defendants have been unjustly enriched at the expense of the Plaintiffs and the Plaintiff Classes, who are entitled to in equity, and hereby seek, the disgorgement and restitution of Defendants' wrongful profits, revenue, and benefits, to the extent, and in the amount, deemed appropriate by the Court; and such other relief as the Court deems just and proper to remedy the Defendants' unjust enrichment.

Defendants argue that Plaintiffs' lack of manifest injury precludes their claim for unjust enrichment. Specifically, they allege that because any defects in the Tires or Explorers have not manifested themselves, the "plaintiffs received tires and vehicles that have functioned and continue to function property." Brief III at 66.

Under Tennessee law, in order to establish an unjust enrichment claim, Plaintiffs must demonstrate that (1) Plain-

tiffs conferred a benefit upon Defendants; (2) Defendants appreciated the benefit; and (3) it would be inequitable for Defendants to retain the benefit without paying for it. *See B&L Corp. v. Thomas & Thorngren, Inc.*, 917 S.W.2d 674, 680 (Tenn. App. 1995) (citing *Paschall's, Inc. v. Dozier*, 407 S.W.2d 150, 154 (1966)). Similarly, under Michigan law, "the elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Barber v. SMH (US), Inc.*, 509 N.W.2d 791, 796 (1993). In this case, Plaintiffs allege that Defendants sold them defective products for the price of non-defective products. If Plaintiffs can demonstrate as a factual matter that their Tires and/or Explorers are, in fact, defective and therefore worth less than they paid for them, then they (at least those who purchased their Tires or Explorers from one of Defendants or Defendants' agents) will have shown that Defendants obtained a benefit (a higher sale price) at the expense of Plaintiffs. The lack of a tread separation or a roll-over incident will not preclude Plaintiffs from maintaining at their unjust enrichment claim, and accordingly we hold that Defendants are not entitled to dismissal of this claim on that basis.

IV. Application of Economic Loss Rule to Certain Plaintiffs

As noted above, three of the named Plaintiffs--Gary Gustafson, William Wehking, and Allan Simpson--allege that they have experienced tread separation incidents with their Firestone tires. Defendants concede that these plaintiffs have asserted an injury in the form of one or more damaged tires. They argue, however, that these plaintiffs' negligence claims are barred by the economic loss doctrine. We share the opinion that these negligence claims against Firestone are

barred under Tennessee law, but hold that they may pursue their claims against Ford[41] under Michigan law.

Under Tennessee law, the economic loss doctrine bars tort claims in which a plaintiff has suffered only economic damages. *Ritter v. Custom Chemicides, Inc.*, 912 S.W.2d 128, 133 (Tenn. 1995) ("Tennessee has joined those jurisdictions which hold that product liability claims resulting in pure economic loss can be better resolved on theories other than negligence."). Damage to a defective product itself generally is treated as economic loss not recoverable in tort, but rather "most naturally understood as a warranty claim." *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872-76 (1986) (noting that "the tort concern with safety is reduced when an injury is only to the product itself," and holding that "no products-liability claim lies in admiralty when the only injury claimed is economic loss," including damage to the defective product itself); *see also Restatement (Third) of Torts: Products Liability* § 21 cmt. d (1997) ("When a product defect results in harm to the product itself, the law governing commercial transactions sets forth a comprehensive scheme governing the rights of the buyer and seller. . . . These losses are not recoverable [in a tort action] under the rules of this Restatement."). [42] While

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[41] Only the negligence claims of these three plaintiffs against Ford based upon the damage to their tires survive; as discussed above, no Plaintiff has alleged any damage to his or her Explorer as a result of the Explorer defect, indeed, plaintiff William Wehking owned a Ford pick-up truck, not an Explorer.

[42] The Reporter's Note to comment d of the Restatement discusses this issue at length, noting that:

> A strong majority of courts have taken the position that the key to whether products liability law or commercial law principles should govern depends upon the nature of the loss suffered by the plaintiff. If the plaintiff has suffered loss because the defective product simply malfunctioned or self-destructed, the loss is deemed economic

Plaintiffs assert that other states have held otherwise, especially in contexts in which the defective product poses a safety risk, they have cited no Tennessee case so holding, and our research has disclosed none. Plaintiffs further assert that Tennessee applies the economic loss doctrine only in the commercial context; however, nowhere is that distinction reflected in the relevant Tennessee cases. Accordingly, we conclude that, if faced with the question, the Tennessee Supreme Court, applying the economic loss doctrine, would determine that Tennessee law does not recognize a tort claim in cases in which a defect in a product causes damage only to the product itself. Plaintiffs Simpson, William Wehking, and Wilson may not maintain a negligence action against Firestone, and these claims are hereby **DISMISSED**.

Michigan, on the other hand, has consistently limited its application of the economic loss doctrine to the commercial context. *See, e.g., Neibarger v. Universal Coops., Inc.*, 486 N.W.2d 612, 618 (1992); *Republic Ins. Co. v. Broan Mfg. Co., Inc.*, 960 F. Supp. 1247, 1249 (E.D. Mich. 1997) (Michigan's economic loss doctrine "has no application outside the commercial realm."). Accordingly, Ford's motion to dismiss the negligence claims of Plaintiffs Simpson, William Wehking, and Wilson against it is hereby **DENIED.**

V. Defendants' Additional Arguments for Dismissal of Consumer Protection Claims

Defendants make a number of arguments to support their motion to dismiss the consumer protection claims. These arguments are addressed below.

> loss within the purview of the Uniform Commercial Code (UCC). Similarly, if the plaintiff suffers economic loss not caused by damage to the plaintiff's person or other property, that type of loss is to be governed by the UCC.

Restatement (Third) of Torts: Products Liability § 21, Reporter's Note to cmt. d.

A. No Provisions for Class Action

As noted above, the Master Complaint defines the various proposed classes as "*all persons and entities in the United States* who own or lease . . . vehicles equipped with Firestone-brand . . . tires" and "*all residents of the United States* who purchased, owned, or leased new or used Ford Explorers . . . ." Master Complaint, PP 136, 161 (emphasis added). Defendants correctly note that Plaintiffs cannot maintain a class action under either the TCPA or the MCPA. Reply Brief III at 13-14. By its terms, the TCPA does not provide for class actions. Instead, the statute permits "any person who suffers an ascertainable loss of money or property . . . as a result of the use or employment . . . of an unfair or deceptive act or practice . . . [to] bring an action *individually* to recover actual damages." Tenn. Code Ann. § 47-18-109(a)(1).

The terms of the Michigan consumer protection statute require more complex analysis. The MCPA provides for a "class action on behalf of persons residing or injured in this state . . . ." Mich. Comp. Laws § 445.911(3). Because the statute limits class actions to Michigan residents and injurees, nationwide classes, as Plaintiffs have provisionally defined the classes, are not maintainable. Named Plaintiffs, none of whom are Michigan residents, do not contest that all members of the classes proposed in the Master Complaint were injured either in their home state or in the state where their vehicles and/or tires were purchased or leased. Furthermore, there is no allegation that any named Plaintiff purchased or leased her Explorer in Michigan.

For the above reasons, to the extent that Plaintiffs seek relief against Firestone and Ford "for all others similarly situated," Master Complaint, P 312, Plaintiffs' Tenth Claim for Relief is hereby **DISMISSED**.

While class action suits cannot be brought against either Defendant, Plaintiffs may be able to maintain individual con-

sumer protection claims against Ford and Firestone. In *Nesbitt v. American Community Mutual Ins. Co.*, 600 N.W.2d 427, 433 (Mich. Ct. App. 1999), the Court of Appeals of Michigan permitted a non-resident plaintiff to sue his widow's health insurer because the health-insurer was "a Michigan-licensed company, operating from its home office within this state, engaging in trade or commerce." The named Plaintiffs may be able to prove a set of facts concerning conduct in "trade or commerce" at Ford's Michigan headquarters showing that the "controversy implicates the interests of [Michigan] sufficiently to bring the MCPA to bear." *See* 600 N.W.2d at 433.

Likewise, in *Steed Realty v. Oveisi*, 823 S.W.2d 195, 198 (Tenn. Ct. App. 1991), the Court of Appeals of Tennessee permitted out-of-state residents to bring a claim under the TCPA concerning out-of-state real estate purchases. The court found that it had jurisdiction because the defendant "advertised through both press and broadcast media in Tennessee, . . . held the real estate closings in Tennessee, and . . . transacted business from his office in Tennessee." *Id.* Plaintiffs have alleged that Firestone advertises in Tennessee and that Firestone conducts business from its offices there. Firestone, however, argues that the TCPA cannot "be applied . . . to named [plaintiffs] outside of Tennessee who have had no dealings with Firestone in Tennessee" because the *Steed* court found jurisdiction over the out-of-state plaintiff only because he closed the challenged real estate transaction at the defendant's office in Tennessee. Reply Brief III at 15 n. 12. It is not clear from the opinion in *Steed* that the factor noted by Firestone was decisive. In addition, the Court of Appeals was addressing subject matter jurisdiction specifically. Here, we are concerned with whether the TCPA regulates the conduct of Tennessee businesses, regardless of where the court enforcing the TCPA sits or the plaintiffs reside. Firestone's argument is not convincing on this point. Therefore, the

named Plaintiffs may have individual claims under the TCPA and the MCPA.

B. Purchase or Lease for Personal Use

Because out-of-state individuals can bring claims against Ford and Firestone under the MCPA and the TCPA, respectively, we address the remainder of Defendants' arguments for dismissing Plaintiffs' consumer protection claims. With respect to the MCPA,[43] Ford maintains that named Plaintiffs failed to alleged that they "purchased" or "leased" their vehicles or tires. Brief III at 4. The MCPA requires that the alleged deceptive or unfair act or practice occur in the "conduct of trade or commerce." Mich. Comp. Laws § 445.903(a)(1). "'Trade or commerce' means the conduct of a business providing goods . . . [for] sale [or] lease." Mich. Comp. Laws § 445.902(d). The Court finds that Plaintiffs satisfy the pleading requirements set forth by these two provisions of the MCPA. We note that for a number of Plaintiffs, the Master Complaint uses the magic words deemed necessary by Ford. *See, e.g.*, Master Complaint, P 16 ("Plaintiff Eberly *leases* a 2000 Ford Explorer equipped with Firestone Wilderness AT P235/70R15 Tires.") (emphasis added). Furthermore, the remainder of Plaintiffs are alleged to "have" or to "own" Explorers. *See, e.g., id.* at P 19 ("Plaintiff Moran *owns* a Ford Explorer with Firestone Wilderness AT Tires.") (emphasis added). Under Rule 12(b)(6), dismissal is appropriate only if it appears to a certainty that the plaintiff cannot establish any set of facts which would entitle him to the relief sought. *Hrubec v. National Railroad Passenger Corp.*, 981 F.2d 962, 963 (7th Cir. 1992). A plaintiff is also entitled to all reasonable inferences to be drawn from the factual allegations in the complaint. *Holman*, 211

[43] The TCPA is more broadly worded than the MCPA. Defendants' arguments in this section are not relevant to Plaintiffs' claims against Firestone under the Tennessee consumer protection statute.

F.3d at 402. The named Plaintiffs who allege ownership of Explorers likely may be able to establish, consistent with ownership, that they purchased their vehicles, rather than, for example, that they received them as gifts from benevolent relatives. Indeed, the former scenario certainly is a more reasonable inference than the latter possibility.

Similar reasoning disposes of Ford's argument that the elements of an MCPA claim are not pled because Plaintiffs failed to allege purchase or lease of the vehicles "primarily for personal, family, or household purposes" as required by Mich. Comp. Laws § 445.902(d). Reply Brief III at 14. The typical allegation about the named Plaintiffs is as follows: "Plaintiff Cheryl Stuart resides in Charleston, West Virginia, and is a citizen of the State of West Virginia. Plaintiff Stuart owns a 1998 Ford Explorer that was equipped with Wilderness AT Tires." Master Complaint, P 28. None of the named Plaintiffs alleges that he or she is a business or uses the vehicles or tires for business purposes. While some Plaintiffs may use their vehicles primarily for non-household purposes, a "set of facts could be proved consistent with the allegations" that would state a claim under the MCPA by establishing personal use of the Explorers. *Hrubec*, 981 F.2d at 963. Under the system of notice pleading established by Federal Rule of Civil Procedure 8, such specificity is not required at this stage of the proceedings. Because we are addressing a motion to dismiss, Defendant's objection to the complaint on this ground is premature.

C. Pleading Fraud with Particularity

Defendants contend that Plaintiffs' claims under the state consumer protection statutes must be dismissed because they failed to plead their fraud-based claims with particularity. Brief III at 2. Because "the great majority of the specific practices enumerated in the [MCPA]--including those relied upon by [Plaintiffs]--involve fraud," *Mayhall*, 341 N.W.2d at 270, Plaintiffs' pleadings regarding these practices are sub-

ject to the requirements of Federal Rule of Civil Procedure 9(b).[44] Hence, "the circumstances constituting fraud or mistake [must] be stated with particularity." Fed. R. Civ. P. 9(b). Because this is a diversity suit in federal court, the standard for pleading requirements under Rule 9(b) is set by the Seventh Circuit. *See Minger v. Green*, 239 F.3d 793, 800 (6th Cir. 2001).

Applying this standard is complicated because the elements that must be pled with particularity depend on the elements of the underlying substantive statute, which here are the TCPA and the MCPA. *See General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1079 (7th Cir. 1997) (holding that although pleading fraud under Rule 9(b) normally requires providing the "who, what, when, where, and how" of specific misrepresentations, certain details are not needed in a suit for constructive fraud because elements of constructive fraud exclude specific misrepresentation). Not surprisingly, there are no cases applying the Seventh Circuit's interpretation of Rule 9(b) to the TCPA or the MCPA. There is, however, one federal court in Michigan that considered the MCPA under Rule 9(b) as interpreted by the Sixth Circuit. In *Platsis v. E.F. Hutton & Co.*, 1985 U.S. Dist. LEXIS 23492, 1985 WL 447, at *3 (W.D. Mich. Jan. 11, 1985), the court found a complaint under the MCPA sufficient because "it alleged the time, place and contents of the

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[44] For instance, Plaintiffs allege that "Ford violated state consumer protection statutes when they falsely represented that the . . . Explorers were of a particular standard or quality when they were not." Master Complaint, P 308; see Mich. Comp. Laws § 445.903(1)(e) ("Representing that goods or services are of a particular standard, quality, or grade . . . if they are of another [is unlawful.]"); Tenn. Code Ann. § 47-18-104(b)(7) ("Representing that goods or services are of a particular standard, quality or grade . . . if they are of another [is prohibited.]"). As the court in *Mayhall* correctly noted, such an allegation concerns fraudulent conduct. 341 N.W.2d at 270 (citing Mich. Comp. Law 445.903(1)(e) and other sections as examples of prohibited practices involving fraud).

misrepresentation, the identity of the person making the misrepresentation, and the consequences of the misrepresentation." This standard is similar to the requirement in the Seventh Circuit that the plaintiff allege the "who, what, when, where, and how" of the fraud. *See DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990). Both precedents will guide our inquiry into whether Plaintiffs state their consumer protection claims with the requisite particularity.[45]

Contrary to Ford's contention, with one potentially correctable exception, Plaintiffs plead with particularity the "circumstances constituting fraud." Plaintiffs list a number of advertisements for Ford Explorers. Master Complaint, P 124(a)-(m). Plaintiffs' allegations generally include a quote from the advertisement, the date the advertisement was issued, and the place of publication. *See, e.g., id.* at P 124(a) ("In an advertisement in the December 31, 1999 issue of *People* magazine, the Explorer was advertised as "'providing exceptional control.'") (alteration in original). Ford does not argue that it did not make these representations or that some other entity was responsible for placing the advertisements. Instead, Defendant suggests that such statements are "mere statements of opinion and thus do not rise to the level of fraud or fraudulent misrepresentation." Reply Brief III at 15 n.14. However, Plaintiffs allege that "the Explorer . . . [has] significant handling and stability defects." Master Complaint, P64. If Plaintiffs can establish facts consistent with that allegation, then the statement that the Explorer provides "exceptional control" could be a misrepresentation.

"The consequences of the misrepresentation" refer to reliance and injury. The issue of loss was decided in favor of Plaintiffs in the above discussion on injury as it relates to all of Plaintiffs' claims and will not be repeated here. Plaintiffs

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[45] Our research revealed no cases applying Rule 9(b) pleading requirements to the TCPA.

allege reliance generally, claiming that "this recently discovered decade-long and continuing pattern of deceit led millions of consumers to purchase or lease Ford Explorers at prices far in excess of the values which would have been assigned to such vehicles had these dangers been disclosed." Master Complaint, P6. In a class action, this allegation would likely suffice. In *Dix v. American Bankers Life Assurance Co. of Florida*, 415 N.W.2d 206, 209 (Mich. 1987), the Supreme Court of Michigan held "that members of a class proceeding under the Consumer Protection Act need not individually prove reliance on the alleged misrepresentations [as long as]. . . the class can establish that a reasonable person would have relied on the representations."

As discussed above, Plaintiffs here cannot bring a class action under the MCPA on behalf of a nationwide class. Therefore, they are subject to a higher pleading requirement than that set forth in *Dix*. Various Michigan cases have required plaintiffs to show that the allegedly false representation made by the defendant influenced their decision to enter into the contested transaction. In *Mayhall*, 341 N.W.2d, the court characterized loss under the MCPA as the frustration of expectations brought about through reliance on defendant's false representations. The court in *Zine v. Chrysler Corp.*, 600 N.W.2d 384, 398 (Mich. Ct. App. 1999), looked at the materiality of the defendant's representation in order to determine whether the plaintiff had an MCPA claim because one element of fraud is materiality. The *Zine* court determined that "a material fact for purposes of the MCPA would likewise be one that is important to the transaction *or affects the consumer's decision* to enter into the transaction." *Id.* (emphasis added). Furthermore, the language of the MCPA itself requires a causal link between the alleged misrepresentation or omission and the injury. Mich. Comp. Law § 445.911(2) ("a person who suffers a loss *as a result of a violation* of this act may bring an action to recover actual dam-

ages or $ 250.00, whichever is greater . . .") (emphasis added).

One Tennessee case, *Ganzevoort v. Russell*, 1995 Tenn. App. LEXIS 692, 1995 WL 623047, at *2-3 (Tenn. Ct. App. Oct. 25, 1995), concludes that the TCPA does not require plaintiffs to prove reliance. However, this same case dismisses the plaintiff's claim because the record did not indicate "how the deceptive act affected the [contested] trade." *Id.* at *2. The court reasoned that the deceptive act occurred only after the plaintiff had closed the transaction and that, therefore, the deceptive act could not have caused the plaintiff to enter into the transaction. Because we find the court's statement on reliance confusing in light of its reasoning and, ultimately, unconvincing, we shall rely on the statutory language. The TCPA uses "linking" language similar to that in the MCPA. It permits "any person who suffers an ascertainable loss . . . *as a result of the use or employment by another person of an unfair or deceptive act* . . . [to] bring an action . . ." Tenn. Code. Ann. § 47-18-109(a)(3). We conclude that if the Supreme Court of Tennessee were applying this language to the situation before us, it would reach a conclusion similar to that reached by the Michigan courts interpreting the MCPA.

Plaintiffs allege that Ford made various misrepresentations and omissions regarding the quality of Explorers. *E.g.*, Master Complaint, P 308 ("[Defendants] concealed and suppressed facts material to the true characteristics, standards, and quality of these products."). For Plaintiffs to show that they suffered a loss as a result of a violation of one of the sections of the MCPA or the TCPA concerning misrepresentations and omissions, they must also establish that they took the allegedly false statements into account when making their decision to lease or purchase Explorers. Should the named Plaintiffs wish to prosecute their suits under the TCPA and MCPA individually, they shall be granted leave

to amend the complaint in order to allege individual reliance. Therefore, Plaintiffs' Claims under the TCPA and the MCPA are hereby **DISMISSED** and Plaintiffs are **GRANTED** leave to amend the Master Complaint as discussed above.

VI. Defendants' Additional Arguments for Dismissal of Express and Implied Warranty Claims

A. Notice of Breach

U.C.C. § 2-607(3)(a)[46] provides: "Where a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." Defendants argue that "because Plaintiffs have not alleged that they provided the requisite notice under § 2-607, their breach of warranty claims must be dismissed." Brief III at 41.

Courts vary widely in their interpretations of § 2-607(3)(a). For example, some courts have held, with varying degrees of analysis, that the filing of a lawsuit can, at least in some instances, satisfy the notice of breach requirement. *See, e.g., In Re Latex Gloves Prods. Liab. Lit.*, 134 F. Supp. 2d 415, 422-23 (E.D. Pa. 2001); *Panda Capital Corp. v. Kopo Int'l, Inc.*, 662 N.Y.S.2d 584, 586 (1997); *Mullins v. Wyatt*, 887 S.W.2d 356, 358 (Ky. 1994); *Hudson v. Gaines*, 403 S.E.2d 852, 854 (Ga. Ct. App. 1991); *Chemtrol Adhesives, Inc. v. American Mfgs. Mutual Ins. Co.*, 537 N.E.2d 624, 638 (Ohio 1989); *Shooshanian v. Wagner*, 672 P.2d 455, 463 (Alaska 1983). Other courts have reached the opposite conclusion. *See, e.g., Brookings Municipal Utilities, Inc. v. Amoco Chem. Co.*, 103 F. Supp. 2d 1169, 1176 (D.S.D. 2000) (citing *Hepper v. Triple U Enterprises, Inc.*, 388 N.W.2d 525, 529 (S.D. 1986)); *Connick v. Suzuki Motor Co., Ltd.*, 675 N.E.2d 584, 590 (Ill. 1996) (holding that under

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[46] Mich. Comp. Laws § 440.2607(3)(a); Tenn. Code Ann. § 47-2-607(3)(a).

Illinois law only a consumer buyer who suffered a personal injury may satisfy § 2-607 by filing suit); *Lynx, Inc. v. Ordnance Prods., Inc.*, 327 A.2d 502, 513-14 (Md. 1974). The parties have not cited any case in which a Tennessee or Michigan court has addressed this issue, and our own research has unearthed none. Therefore, we must determine into which camp the Tennessee and Michigan Supreme Courts would fall if confronted with this issue.

In our view, the more well-reasoned cases are those that hold that the filing of a complaint may be sufficient to satisfy the notice of breach requirement of § 2-607 under certain circumstances. While Defendants refer to § 2-607(3)(a) as establishing a "pre-litigation notice" requirement, the plain language of the statute does not require that notice be given prior to filing suit, only that notice be given within a reasonable time. Neither are the main policies behind the notice of breach requirement--protecting defendants from stale claims, "opening the way for normal settlement through negotiation" (Comment 4 to U.C.C. § 2-607), and giving the defendant the opportunity to correct any defect--necessarily frustrated if notice is given by filing suit. Obviously, the first policy is promoted equally whether early notice is given by informal letter or the filing of a lawsuit. As to the policy of promoting settlement, we do not believe that filing suit is an impediment to successful settlement negotiations. "To the contrary, the prospect of going to trial is often a powerful incentive to a defendant to investigate the claims against it and to arrive at a reasonable agreement." *Shooshanian*, 672 P.2d at 462-63. Finally, in cases such as this one (assuming, as we must, that the facts as pled are true), where Defendants had ample notice of the defect in the products[47] well before the lawsuit

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[47] Defendants, citing to *Connick*, 675 N.E.2d at 590, point out the important distinction between notice of problems with a product in general (in *Connick*, "safety concerns regarding the Samurai") and notice of trouble "with the particular product purchased by a particular buyer." However, in this case Plaintiffs allege in the Master Complaint that *all* of

was filed, and, indeed, allegedly well before Plaintiffs themselves did, and chose not to remedy those defects, no purpose would be served by requiring pre-litigation notice.[48] Therefore, we conclude that a per se rule that the filing of a lawsuit can never satisfy the notice of breach requirement would be improper, and we find nothing in either Michigan or Tennessee law suggesting that the Supreme Courts of those states would not also so hold.[49] Whether § 2-607(3)(a) was satisfied in this case involves the resolution of questions of fact; however, it is clear that there are facts consistent with the Master Complaint that, if ultimately proven, will support a finding that the Plaintiffs provided the requisite notice of breach to the Defendants by filing suit. Accord-

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the Tires and Explorers are defective and that Defendants were aware of that fact well before Plaintiffs filed suit, and at this stage these allegations must be accepted as true.

[48] The Court recognizes that there is split authority on the issue of whether actual notice of defendants of problems with a product is sufficient to satisfy § 2-607. *See* James J. White & Robert S. Summers, *Uniform Commercial Code* 611 n. 1 (4th Ed. 1995) (collecting cases and noting that "the majority of cases find actual notice to suffice . . . but several cases . . . require more than actual notice"). Thus, whether a defendant had actual notice before the plaintiff filed suit is one factor which should be considered in determining whether the lawsuit was adequate notice in a given case, regardless of whether actual notice by itself is sufficient to constitute notice.

[49] Indeed, we found two cases from Tennessee involving other notice provisions that lend some support to this determination. In *Moon v. Auto-Owners Ins. Co.*, 736 S.W.2d 92, 94 (Tenn. 1987), the court addressed the issue of whether the filing of a lawsuit satisfied Tenn. Code Ann. § 50-6-201, which provides, in relevant part, that "no [worker's compensation benefits] shall be payable under the provisions of this chapter unless . . . written notice is given the employer within thirty (30) days after the occurrence of the accident." The court held that it did. *Id.* Similarly, in *Wal-Board Supply Co., Inc. v. Daniels*, 629 S.W.2d 686, 688 (Tenn. App. 1981), the court held that the requirement in a bond that "notice of claims must be given" within a certain time period was satisfied when the plaintiff filed suit within that time period.

ingly, the Plaintiffs' claims will not be dismissed on the basis that they did not satisfy § 2-607(3)(a).

B. Statute of Limitations

Defendants assert that under the applicable statute of limitation, the breach of express and implied warranty claims of Plaintiffs Richard Glover, Allan Simpson, Jane Lill,[50] Susan Grayson, Dawn Whorl, and John Dovich are time barred. Plaintiffs argue, and Defendants do not dispute, that under Indiana's choice of law rules, Indiana's statutes of limitations apply to all of the state law claims in this case. *See Singletary v. Continental Ill. Nat'l Bank & Trust Co. of Chicago*, 9 F.3d 1236, 1242 (7th Cir. 1993) (citations omitted) ("For purposes of choice of law statutes of limitations are treated as procedural rules . . . so the forum state . . . can and does supply the complete statute of limitations for use in this case . . . ."); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1385 (S.D. Ind. 1989) (citations omitted) ("Because in Indiana statutes of limitations are procedural in nature, Indiana choice-of-law rules state that the statute of limitations of the forum state, Indiana, will apply."), aff'd, 917 F.2d 278 (7th Cir. 1990); *but see Jean v. Dugan*, 20 F.3d 255, 259 (7th Cir. 1994) (treating statute of limitations as substantive for choice of law purposes).

The statute of limitations for a breach of warranty action in Indiana is four years. Ind. Code § 26-1-2-725(1).[51] As noted above, a breach of warranty cause of action accrues when tender of delivery is made. Ind. Code § 26-1-2-725(2). Defendants assert that because each of the six Plaintiffs

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[50] Defendants further allege in a footnote that these three Plaintiffs' unjust enrichment claims also are barred by Florida's four-year statute of limitations for such claims. Brief III at 69 n. 65.

[51] The identical statute is found in Michigan, Mich. Comp. Laws § 440.2725(1), and Tennessee, Tenn. Code Ann. § 47-2-725(1).

listed above owned or owns a model-year 1995 or earlier Explorer, and each filed suit in 2000, each failed to file his or her claim within the four-year limitation period, and therefore those warranty claims are time barred.[52]

Plaintiffs counter that the statute of limitations was tolled due to Defendants' fraudulent concealment of the defects in the Tires and the Explorers.[53] Defendants argue that Plaintiffs have failed in two distinct ways to plead the facts necessary to support a finding of fraudulent concealment:[54] first, they have not alleged that Plaintiffs exercised reasonable care and due diligence in detecting the fraud; and second, they have not alleged that Defendants actively concealed the defects, rather than simply failed to disclose them.[55] Plaintiffs were not required to plead with such specificity under the Federal Rules of Civil Procedure, however. *See Kaplan v. Shure Bros., Inc.*, 153 F.3d 413, 419 (7th Cir. 1998). Instead, a complaint need only give the defendant "at least minimal notice of the claim." *Id.* (citing Fed. R. Civ. P.

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[52] For purposes of this discussion only, we accept Defendants' implicit assertion that the model year represents the latest point at which Plaintiffs purchased their Explorers, although that may not be accurate.

[53] Indiana Code § 34-11-5-1 codifies the doctrine of equitable tolling because of fraudulent concealment: "If a person liable to an action conceals the fact from the knowledge of the person entitled to bring the action, the action may be brought at any time within the period of limitation after the discovery of the cause of action."

[54] The Court at this point offers no opinion on whether Defendants' representation of Indiana law respecting fraudulent concealment is correct, as it is not necessary to do so to resolve the instant motion.

[55] We note that Plaintiffs do plead at least one specific instance of active concealment by Ford when, in P 93 of the Master Complaint, they allege that Ford "deceptively labeled its Venezuela recall a 'customer notification enhancement action' rather than acknowledging that it was actually recalling tires it knew had the potential for sudden and catastrophic failure" in order to prevent United States Explorer owners from learning of the problems with the Tires.

8(a)(2) and *Jackson v. Marion County*, 66 F.3d 151, 154 (7th Cir.1995)). Indeed, as noted above, to succeed on a motion to dismiss, a defendant must show that there is no set of facts consistent with the plaintiffs' allegations that would entitle the plaintiff to relief. *Id.*; *Holman*, 211 F.3d at 402. Whether or not the facts contained in the Master Complaint would, by themselves, support a finding of fraudulent concealment is irrelevant; the relevant question is whether there is any set of facts consistent with the Master Complaint that will support such a finding if Plaintiffs ultimately can prove them. The answer to that question is undeniably yes; accordingly, Plaintiffs' warranty claims will not be dismissed based upon the statute of limitations contentions.

VII. Defendants' Additional Arguments for Dismissal of Breach of Implied Warranty of Merchantability Claims

Defendants argue that Plaintiffs have failed to plead properly their claims for breach of the implied warranty of merchantability for several reasons, each of which is addressed below.

A. Plaintiffs' Failure to Allege Vertical Privity

Defendants argue that Plaintiffs' implied warranty claims must be dismissed because the Master Complaint does not allege that each Plaintiff was in vertical privity with the Defendants. Specifically, Defendants object to the fact that Plaintiffs "do not allege that they purchased or leased their vehicles and tires directly from Ford or Firestone; nor do they allege that they acquired their vehicles or tires from dealers, let alone that the dealers were agents of Ford or Firestone." Reply Brief III at 23-24. Again, however, Plaintiffs were not required to include such allegations in their complaint under our notice pleading system. *See Kaplan*, 153 F.3d at 419. Therefore, the court in *Kaplan* held that "the fact that [the plaintiff] did not plead facts showing that

he was in privity with [the defendant] . . . [did not] bar his claim as a matter of law; as long as he put [the defendant] on notice of the nature of his claim, his case can proceed." *Id.* Here Defendants certainly cannot in good faith argue that the Master Complaint does not put them on notice of the nature of Plaintiffs' claims against them. Further, there obviously are facts consistent with the allegations in the Master Complaint that Plaintiffs can endeavor to prove which will satisfy the privity requirement. Accordingly, the implied warranty claims in the Master Complaint will not be dismissed for failure to plead vertical privity.

B. Durational Limits of Implied Warranty Obligations

In P 205 of the Master Complaint, Plaintiffs assert:

> Any limitations periods, limitations on recovery, or exclusion of implied warranties in [Defendants'] express warranty are unconscionable within the meaning of section 2-302[56] of the Uniform Commercial Code, and therefore are unenforceable, in that, among other things, the Tires and Explorers contain latent defects of which [Defendants] were aware at the time of sale, and buyers lacked a meaningful choice with respect to the terms of the express written warranties due to unequal bargaining power and a lack of warranty competition among dominant tire and automobile manufacturers.

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[56] U.C.C. Section 2-302(1) (Mich. Comp. Laws § 440.2302(1); Tenn. Code Ann. § 47-2-302(1)) provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause so as to avoid any unconscionable result.

In their motion to dismiss, Defendants dispute the accuracy of this assertion, arguing that the durational limits are enforceable because they comply with U.C.C. § 2-316 and, according to a leading U.C.C. treatise, there are "no cases that find a disclaimer conforming to 2-316 to be unconscionable." Brief III at 54 (quoting James J. White & Robert S. Summers, *Uniform Commercial Code* 675 (4th Ed. 1995)).[57] The Court assumes that Defendants believe that some or all of Plaintiffs' breach of implied warranty claims are barred by the durational limits contained in Defendants' express warranties. However, Defendants do not make this argument explicitly in their motion to dismiss, perhaps because the Master Complaint--quite understandably--does not contain all of the facts necessary to determine which Plaintiffs fall into that category. Rather, Defendants simply argue that Plaintiffs' assertion of unconscionability "must fail." Brief III at 55. While Defendants' argument raises several interesting legal issues that likely will ultimately need to be resolved, the Court cannot resolve them in the vacuum in which they have been presented. Paragraph 205 by itself does not purport to assert a claim for relief, and therefore is not the proper subject of a motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state such a claim. Further, even if Defendants had raised the issue of the enforceability of the durational limits in the proper context, as a defense to

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[57] U.C.C. § 2-316(2) (Mich. Comp. Laws § 440.2316(2); Tenn. Code Ann. § 47-2-316(2)) sets forth the requirements which must be satisfied for an exclusion or modification of the implied warranty of merchantability to be enforceable. Courts and commentators alike have struggled with the intricacies of this and other U.C.C. provisions related to warranty disclaimers and unconscionability. Indeed, the two authors of the treatise cited by Defendants, Professor Summers and Professor White, disagree with one another as to some of the finer points. *See* White & Summers, *supra*, at 677 ("One of us believes that these courts misread the intention of the drafters and that the drafters never intended 2-302 to be an overlay on the disclaimer provisions of 2-316."). We view it as neither necessary nor prudent for us to weigh in on these issues at this point.

certain Plaintiffs' implied warranty claims, U.C.C. § 2-302(2)[58] provides that "when it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." Therefore, we regard it as inappropriate to attempt to resolve the issue of unconscionability on the pleadings alone. *See Carlson v. General Motors Corp.*, 883 F.2d 287, 293 (4th Cir. 1989) (holding that it was error to determine that durational limitations were reasonable and conscionable based solely on the pleadings and that the court "will be equipped to address that question only *after* plaintiffs have had an opportunity--whether in connection with a motion for summary judgment or at trial--to present evidence that, for example, they had no 'meaningful choice' but to accept the limited warranties, or that the durational limitations 'unreasonably' favored the defendant"). Accordingly, Defendants' motion to dismiss Plaintiffs' claims for breach of implied warranty is hereby **DENIED**.

VIII. Defendants' Additional Arguments for Dismissal of Express Warranty Claims

In the Master Complaint, Plaintiffs allege that Defendants "expressly warranted the Tires and Explorers to be free of defects at the time of delivery" and that Defendants breached those warranties by selling defective Tires and Explorers. Master Complaint, PP 314-15. Ford provides a written warranty along with each new Explorer that it sells, in which it warrants that its dealers will "repair, replace or adjust all parts (except tires) . . . that are defective in factory-supplied materials or workmanship for 3 years or 36,000

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[58] Mich. Comp. Laws § 440.2302(2); Tenn. Code Ann. § 47-2-302(2).

miles (whichever occurs first)."[59] Ford asserts that because "no named Plaintiff alleges that he or she ever presented a covered vehicle to an authorized Ford dealer for warranty repair within the warranty period and was denied service," Brief III at 37, no Plaintiff asserts a valid claim for breach of Ford's written warranty. Similarly, Firestone's written warranty provides that it will replace any warranted tire that has "become unusable for any reason within the manufacturer's control" as long as the tire has not worn down to 2/32nds of an inch of tread depth. Firestone argues that none of the named Plaintiffs alleges that "he or she satisfied the minimum preconditions for obtaining a replacement tire under Firestone's warranty," and therefore each has failed to state a claim for breach of written warranty. These arguments made as part of a motion to dismiss are without merit, inasmuch as under the Federal Rules, Plaintiffs were not required to include such specific factual allegations in their complaint. Whether Plaintiffs satisfied any obligations they may have had under Defendants' written warranties is a factual question that is not properly addressed by a motion to dismiss premised, as it is, on a lack of factual detail. Further, Plaintiffs argue that Defendants' limitations of remedies in their written warranties fail of their essential purpose, and therefore their remedies for breach of warranty are not limited to repair or replacement;[60] this, too, raises factual issues that must be resolved in a context other than a motion to dismiss.

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[59] Because Plaintiffs did not attach copies of the relevant Ford written warranties to the Master Complaint, Ford quite properly submitted them with its motion to dismiss. The precise language of the warranties varies slightly between model years, but the substance is the same.

[60] U.C.C. § 2-719(2) (Mich. Comp. Laws § 440.2719(2); Tenn. Code Ann. § 47-2719(2)) provides that "where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided [in other provisions of the U.C.C.]." Plaintiffs argue that the Defendants' remedies have failed of their essential purpose because (1) Ford's promise to repair or replace any defective part of the Explorer is

In addition to the written warranties provided by Defendants, Plaintiffs also allege that Defendants expressly warranted the Explorers and the Tires to be tough and rugged by describing the Explorer as a "sport utility vehicle," and giving the Tires names such as AT ("all terrain") and "Wilderness," and that Defendants breached these "core description warranties" when they sold defective tires and vehicles that were anything but tough and rugged. We agree with Defendants that these descriptions alone, as a matter of law, are not sufficient to create any express warranty regarding the safety or performance of the Tires and the Explorer. However, Plaintiffs also allege that each Defendant created an express warranty regarding its product's safety with statements it made in its advertising campaigns. Defendants do not argue that an advertising campaign, as a matter of law, can never create an express warranty;[61] rather, they argue that the particular advertising statements identified in the Master Complaint do not constitute warranties. Whether Defendants' advertisements contained statements sufficient to create an express warranty, whether any such warranty was the basis of the bargain between any given Plaintiff and Defendant(s), and whether Defendant(s) breached any such warranty are all

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worthless because the Explorer's defect cannot be corrected by repairing or replacing any defective part; and (2) Firestone has refused to replace some of the defective tires, and in instances where it has replaced tires it has used equally defective replacement tires.

[61] Presumably that is because it is clear that under some circumstances warranties can be created through advertising. *See Triple E, Inc. v. Hendrix & Dail, Inc.*, 543 S.E.2d 245, 247 (S.C. App. 2001) (citing: *Gherna v. Ford Motor Co.*, 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966); *Torres v. Northwest Engineering Co.*, 949 P.2d 1004 (Haw. 1997); *Scheuler v. Aamco Transmissions, Inc.*,, 571 P.2d 48 (Kan. 1977); *Courtney v. Bassano*, 733 A.2d 973 (Me.1999); *Interco, Inc. v. Randustrial Corp.*, 533 S.W.2d 257 (Mo. App.1976); *Daughtrey v. Ashe*, 413 S.E.2d 336 (Va. 1992); *Arrow Transp. Co. v. A.O. Smith Co.*, 454 P.2d 387 (Wash. 1969)); *see also* White & Summers, *supra*, at 494-95 (collecting cases that have so held).

questions of fact that cannot be resolved by a motion to dismiss. Accordingly, Defendants' motion to dismiss Plaintiffs' claims for breach of express warranty is hereby **DENIED**.

IX. Defendants' Additional Arguments for Dismissal of Magnuson-Moss Warranty Act Claims

Because Plaintiffs' claims under the Magnuson-Moss Warranty Act are derivative of their state law warranty claims, Defendants argue that the Magnuson-Moss claims must be dismissed for the same reasons as the state law claims. Accordingly, since the motion to dismiss the state law warranty claims is denied, the motion to dismiss the Magnuson-Moss Act claims must also be and is hereby **DENIED.**

X. Defendants' Additional Arguments for Dismissal of Unjust Enrichment Claims

As noted above, Plaintiffs allege that Defendants have been unjustly enriched by selling them defective Explorers and Tires for the price of non-defective Explorers and Tires. Defendants move to dismiss Plaintiffs' unjust enrichment claim on the ground that Plaintiffs also have alleged that written contracts (in the form of written warranties) existed between the parties, and unjust enrichment is a quasi-contractual remedy which may only be invoked in the absence of an express contract. Plaintiffs counter that they are permitted under Federal Rule of Civil Procedure 8(e)(2) to allege alternative inconsistent theories in their complaint. Rule 8(e)(2) provides:

> A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is

> not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds.

Defendants correctly point out that the Master Complaint does not set out explicitly the alternative nature of the claims for breach of express warranty and unjust enrichment, but such is not required under Rule 8. A complaint "need not use particular words to plead in the alternative, [but] must use a formulation from which it can be reasonably inferred" that theories are intended as alternatives. *See Holman*, 211 F.3d at 407. There is nothing unreasonable about such an inference in this case. Therefore, while we agree that the Master Complaint could have been more artfully drafted to expressly plead the two claims in the alternative, we will not dismiss the unjust enrichment claim for such a failure to do so.

Defendants also attack Plaintiffs' unjust enrichment claim on the merits. As set forth above, under both Michigan and Tennessee law, in order to state a claim for unjust enrichment, Plaintiffs must prove that Defendants have received and retained a benefit from Plaintiffs. Defendants argue that, as to all of the Tires that have been recalled, Plaintiffs have failed to allege, and cannot prove, that Defendants have retained any benefit because Defendants have replaced the Tires at considerable cost to them. However, Plaintiffs allege that some or all of the replacement tires offered during the recall suffer from the same defect. Whether this is true, and whether any actions taken by Defendants have divested them of any benefit they received from Plaintiffs from the sale of allegedly defective products, are questions of fact that cannot be resolved at this time or in this context. Because there is at least one set of facts, consistent with the Master

Complaint, which, if proven, would support Plaintiffs' unjust enrichment claim, that claim is not subject to dismissal, and Defendants' motion to dismiss Plaintiffs' unjust enrichment claim is hereby **DENIED**.[62]

CONCLUSION

For the reasons set forth above, the Court **DENIES** Defendants' Motion to Dismiss Plaintiffs' First, Ninth, Eleventh, and Twelfth Claims for Relief. The Court further **GRANTS** Defendants' Motion to Dismiss Plaintiffs' Second through Seventh, Thirteenth, and Fourteenth Claims for Relief. Plaintiffs' Tenth Claim for Relief is **DISMISSED** only to the extent set forth more specifically above.

It is so ORDERED this 27th day of July 2001.

SARAH EVANS BARKER, JUDGE

United States District Court

Southern District of Indiana

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[62] Defendants assert an additional ground for dismissal under Arizona, Florida, Illinois, Louisiana, and Ohio law which the Court need not address.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

In re BRIDGESTONE/FIRESTONE, INC. PRODUCTS LIABILITY LITIGATION ATX, ATX II AND WILDERNESS TIRES	Master File No. IP 00-9373-C-B/S MDL No. 1373 (Centralized Before Judge Sarah Evans Barker)
THIS DOCUMENT RELATES TO ALL CLASS ACTIONS	

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Tab E	State Consumer Protection Acts

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CERTIFICATE OF SERVICE

Service of the foregoing was made by hand delivery or by placing a copy of the same into the United States Mail, first class postage prepaid, this 26th day of July, 2001, addressed to all counsel of record appearing on the Panel Attorney Service List, and others, as necessary.

/s/

NEGLIGENCE
A. VARIATIONS IN ECONOMIC LOSS DOCTRINE
1. **Examples Of States In Which The Economic Loss Doctrine Acts As An Outright Bar To Plaintiffs' Negligence Claims**
Alabama – *Lloyd Wood Coal Co. v. Clark Equip. Co.*, 543 So. 2d 671, 672 (Ala. 1989) (holding that economic loss doctrine bars tort claim seeking recovery of repair costs for defective front-end loader)
California – *Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965) (barring strict liability claim seeking repair costs where alleged defect resulted in damage only to the allegedly defective product itself); *San Francisco Unified Sch. Dist. v. W.R. Grace & Co.*, 44 Cal. Rptr. 2d 305, 314 (Cal. Ct. App. 1995) (under California law, economic loss doctrine bars claims for damage "that occurs through loss of value or use of the goods sold or the cost of repair . . . when there has been no claim of personal injury or damage to other property")
Florida – *Florida Power & Light Co. v. Westinghouse Elec. Co.*, 510 So. 2d 899, 900 (Fla. 1987) (Florida law precludes recovery of purely economic losses in tort)
Indiana – *Prairie Prod., Inc. v. Agchem Div.–Pennwalt Corp.*, 514 N.E.2d 1299, 1304 (Ind. Ct. App. 1987) (noting that a "manufacturer does not owe a duty to avoid causing purely economic damage")
Michigan – *Neibarger v. Universal Coops, Inc.*, 486 N.W.2d 612, 617 (Mich. 1992) (noting that " 'when a plaintiff seeks to impose liability for economic losses only, tort law concerns with product safety no longer apply, and commercial law concerns with economic expectations must govern' ") (citations omitted)
Minnesota – *Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.*, 491 N.W.2d 11, 17 (Minn. 1992) (en banc) ("an action for damage to the defective product itself is always limited to a UCC based recovery"); *Transp. Corp. of Am., Inc. v. IBM*, 30 F.3d 953, 956 (8th Cir. 1994) ("[t]he economic loss doctrine in Minnesota bars recovery under the tort theories of negligence or strict liability for economic losses that arise out of commercial transactions, except those involving personal injury or damage to other property")
New York – *Bocre Leasing Corp. v. Gen. Motors Corp.*, 645 N.E.2d 1195, 1196 (N.Y. 1995) (economic loss doctrine barred negligence claims for "minor property damage to the helicopter itself, with no damage whatsoever to persons or other property")

North Dakota – *Coop. Power Ass'n v. Westinghouse Elec. Corp.*, 493 N.W.2d 661, 663 n.5 (N.D. 1992) (economic loss doctrine bars negligence claims where "there has been no claim of personal injury or damage to other property") (citations omitted)
Pennsylvania – *REM Coal Co. v. Clark Equip. Co.*, 563 A.2d 128, 129 (Pa. Super. Ct. 1989) (denying "recovery in tort where a product malfunctions because of an alleged defect in the product")
South Carolina – *Carolina Winds Owners' Ass'n v. Joe Harden Builder, Inc.*, 374 S.E.2d 897, 902 (S.C. Ct. App. 1988) (barring tort recovery for allegedly defective building construction on econonic loss doctrine grounds)
Texas – *Jim Walters Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986) (barring negligence claims)
2. Examples Of States That Permit Non–Incident Owners To Sue In Negligence Upon A Showing That The Allegedly Defective Tire Or Vehicle Creates A Grave Risk To Other Property Or To Personal Safety
Alaska – *N. Power & Eng'g Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324, 326 (Alaska 1981) (damage caused by a product defect to the product itself would be recoverable if the defect posed an inchoate safety risk)
Arizona – *Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*, 694 P.2d 198, 210 (Ariz. 1984) (where defect makes product unreasonably dangerous to people or property, damage to defective product itself may be recoverable)
Illinois – *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 449-50 (Ill. 1982) (economic loss doctrine bars negligence claims unless the product defect at issue poses a "sudden and dangerous," if inchoate, safety risk)
Maryland – *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 631 (Md. App. 1995)(where defendant's negligence creates serious risk of injury from product's dangerous condition, tort recovery of economic loss allowed)
Oregon – *Gladhart v. Oregon Vineyard Supply Co.*, 994 P.2d 134, 142-43 (Or. Ct. App. 1999) (permitting actionable tort where product defect results in unreasonable danger to persons or property)
Washington – The Washington Product Liability Act ("WPLA"), Wash. Rev. Code § 7.72.010(4) (2000), preempts the common law actions of strict liability and negligence. Under the WPLA, no recovery for purely economic loss is available. *See Washington Water Power Co. v. Graybar Elec. Co.*, 774 P.2d 1199, 1207 (Wash. 1989). However, damage caused to the allegedly defective product itself by an alleged defect that poses a safety risk, even if inchoate, is not considered an "economic loss" under the WPLA and may be recovered under the statute. *See id.* at 1209; *Stuart v. Coldwell Banker Commercial Group, Inc.*, 745 P.2d 1284, 1291 (Wash. 1987).

B. VARIATIONS IN NEGLIGENCE STANDARDS
1. Examples Of State Variations In Test For Defective Design
a. Consumer Expectations Test
Indiana – *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995) ("Indiana's definition of 'defect' is similar to what is commonly referred to as the consumer expectation test"); *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045, 1053 (Ind. Ct. App. 1990) (explaining criteria relevant to consumer expectations test)
Oklahoma – *Woods v. Fruehauf Trailer Corp.*, 765 P.2d 770, 774 (Okla. 1988) (consumer expectation test is used to determine if product is defective)
b. Variations on the Risk–Utility Balancing Test
District of Columbia – *Warner Fruehauf Trailer Co. v. Boston*, 654 A.2d 1272, 1276 (D.C. 1995) (the District of Columbia applies the risk–utility balancing test to determine if a product is dangerously defective, which requires a plaintiff to " 'show the risks, costs and benefits of the product in question and alternative designs,' and 'that the magnitude of the danger from the product outweighed the costs of avoiding the danger' ")
Mississippi – *Gilbert v. Dressler Indus.*, 158 F.R.D. 89, 91 (Miss. Ct. App. 1993) ("Mississippi applies a 'risk–utility' test and has done so since 1987") (citations omitted)
Massachusetts – *Kotler v. Am. Tobacco Co.*, 926 F.2d 1217, 1225 (1st Cir. 1990) (applying the risk–utility test; in addition, plaintiff must establish that there was no reasonable alternative available that would have reduced the harm)
c. Examples of States that Apply a Combination of the Risk–Utility and Consumer Expectation Tests
Alaska – *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 885 (Alaska 1979) (the risk–utility test should be applied in cases in which "the product satisfies ordinary consumer expectations as to its general use but is still 'defective' in that its design exposes the user or bystander to 'excessive preventable danger' ")

Hawaii – *Ontai v. Staub Clinic & Hosp., Inc.*, 659 P.2d 734, 739–40 (Haw. 1983) ("First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective . . . if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design") (citations omitted)
Arizona – *Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876, 879 (Ariz. 1985) ("Where the consumer expectation test is inappropriate, the question of defective and unreasonably dangerous condition may be determined by applying . . . risk/benefit factors") (citations omitted)
California – *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 301 (Cal. 1994) (explaining that risk–utility approach is applied if "ordinary consumers" do not have requisite familiarity with product to allow use of consumer expectation test)
d. Examples of "Combination" States that Shift the Burden Of Proof to Defendants with Respect to Risk–Utility Balancing
California – *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 455 (Cal. 1978) (once plaintiff makes prima facie showing that injury was proximately caused by product's design, burden shifts to defendant to show that design's utility outweighs risk)
Alaska – *Caterpillar*, 593 P.2d at 885 (adopting California's *Barker* test for design defect)
e. Examples of Differing Standards with Respect to Design Defect
(1) "Reasonably Prudent Manufacturer" Test
Kentucky – *Tobin v. Astra Pharm. Prod., Inc.*, 993 F.2d 528, 536 (6th Cir. 1993) (Kentucky law), *cert. denied*, 510 U.S. 914 (1993)
West Virginia – *Morning Star v. Black & Decker Mfg. Co.*, 253 S.E. 2d 666, 683 (W.Va. 1979)
(2) "Fit For Ordinary Use" Test
Pennsylvania – *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1027 (Pa. 1978)
South Dakota – *Shaffer v. Honeywell, Inc.*, 249 N.W. 2d 251, 256 (S.D. 1976)

(3) "Unreasonably Dangerous" Test
Missouri – *Racer v. Utterman*, 629 S.W.2d 387, 393 (Mo. App. 1981)
2. Variations With Respect To Standard Of Duty Of Care
a. The "Hand Formula"
Mississippi – *Maryland Cas. Co. v. City of Jackson*, 493 So. 2d 955, 960 n.3 (Miss. 1986) (applying the Hand formula, which involves determining whether the burden of precaution is less than the magnitude of the accident, if it occurs, multiplied by the probability of occurrence)
New Jersey – *People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 117–18 (1985) (applying Hand formula)
b. Section 282 of the Restatement (Second) of Torts Approach
Iowa – *Marcus v. Young*, 538 N.W.2d 285, 288 (Iowa 1995) (using the Restatement approach, which defines negligence as "conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm") (internal citations and quotation marks omitted)
Georgia – *Savage v. Flagler Co.*, 364 S.E.2d 52, 57 (Ga. 1987) (applying the Restatement approach), *rev'd on other grounds*, 368 S.E.2d 504, 506 (Ga. 1988)
c. "Appreciable Risk of Harm"
Arizona – *Rodriguez v. Besser Co.*, 565 P.2d 1315, 1322 n.4 (Ariz. Ct. App. 1977) (instructing jury to evaluate whether defendant's "acts created an appreciable risk of causing harm rather than a bare possibility thereof")
Arkansas – Arkansas Model Jury Instructions, Civil 3d 301 (1995) (instructing jury to determine whether defendant's actions taken despite "an appreciable risk of harm")
3. Variations With Respect To Whether Existence Of Duty Is Question For Judge Or Jury
Texas – *Gunn v. Harris Methodist Affiliated Hosps.*, 887 S.W.2d 248, 250 (Tex. Ct. App. 1994) ("The existence of a duty is a question of law for the court to decide.")
Hawaii – *Doe v. Grosvenor Props. Ltd.*, 829 P.2d 512, 513 (Haw. 1992) (existence of duty "is entirely a question of law")

Mississippi – *Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1160 (Miss. 1992) ("That courts have ultimate authority to declare duties . . . does not preclude our getting what help we can . . . from juries.")
Indiana – *Harper v. Guarantee Auto Stores*, 533 N.E.2d 1258, 1261–62 (Ind. Ct. App. 1989) (describing the existence of a duty as a "mixed question of law and fact, ultimately to be resolved by the fact–finder")
Wyoming – *Hozian v. Weathermon*, 821 P.2d 1297, 1298 (Wyo. 1991) (duty a mixed question of law and fact)
4. Variations In Determination Of Foreseeability
Michigan – *Trotter v. Hamill Mfg. Co.*, 372 N.W.2d 622, 625 (Mich. Ct. App. 1985) ("The questions of duty and foreseeability are therefore properly determined by the court as matters of law")
California – *Akers v. Kelley Co.*, 219 Cal. Rptr. 513, 520 (Cal. Ct. App. 1985) ("[F]oreseeability is a question of fact for the jury"), *overruled on other grounds by People v. Nesler*, 941 P.2d 87, 101 (Cal. 1997)
Louisiana – *Andrus v. Trailers Unlimited*, 647 F.2d 556, 559 (5th Cir. 1991) (Louisiana law) (applying the duty–risk approach, which conflates the questions of foreseeability and duty, and stating that "[I]t is not the consequences that defendant should have foreseen as 'within the risk' of his conduct that controls the limitation of his liability but the risks that the court, after the conduct has taken place and the injury has been suffered, considers should fall within the 'scope'. . . of the defendant's duty under law, leaving foreseeability as a jury formula for the determination of the violation of duty") (citations omitted)
C. Examples Of Variations In Affirmative Defenses
1. Examples Of "State of the Art" Defense Variations
See generally, John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. Rev. 734, 750–51 (1983). *See also Restatement (Third) of Torts: Products Liability* § 2 (Mar. 13, 1997) ("The term 'state of the art' has been variously defined by a multitude of courts. For some it refers to industry custom or industry practice; for others it means the safest existing technology that has been adopted for use; for others it means cutting edge technology")
Maryland – *U.S. Gypsum Co. v. Mayor of Baltimore*, 647 A.2d 405, 414 (Md. Ct. App. 1994) (Maryland evaluates "state of the art" by the generally accepted view of the relevant expert community at the time the product was sold)
Washington – *Crittenden v. Fibreboard Corp.*, 794 P.2d. 554, 555 n.2 (Wash. Ct. App. 1990) (for state of the art defense Washington measures the

technological feasibility of alternative designs at the time the product was actually manufactured)
2. Examples Of Variations In Affirmative Defenses Based On Plaintiffs' Fault
a. Comparative Negligence Variations
(1) Plaintiff Barred From Recovery If Plaintiff's Fault is Greater Than Defendant's
Texas – Tex. Civ. Prac. & Rem. § 33.001(a) (West 1999) ("claimant may not recover damages if his percentage of responsibility is greater than 50 percent")
Wisconsin – *Delvaux v. Vanden Langenberg*, 387 N.W.2d 751, 756 (Wis. 1986) (comparative negligence bars recovery if greater than negligence of person against whom recovery is sought)
(2) Plaintiff Barred From Recovery If Plaintiff's Fault is Equal To Or Greater Than Defendant's
Georgia – *Union Camp Corp. v. Helmy*, 367 S.E.2d 796, 799–800 (Ga. 1988) (construing statutory provision)
(3) Plaintiff's Recovery Reduced By Percentage of Plaintiff's Fault
Alaska – Alaska Stat. § 9.17.060 (1996) (plaintiff's fault proportionately diminishes the amount of compensatory damages awarded but does not bar recovery)
Florida – Fla. Stat. Ann. § 768.81(2) (2000) (same).
b. Contributory Negligence
Alabama – *Williams v. Delta Int'l Mach. Corp.*, 619 So. 2d 1330, 1331, 1333 (Ala. 1993) (plaintiff cannot recover in a negligence suit where plaintiff's own negligence is shown to have proximately contributed to his damage)
District of Columbia – *Nat'l Health Labs. Inc., v. Ahmadi*, 596 A.2d 555, 561 (D.C. 1991) (District of Columbia has not adopted the doctrine of comparative negligence); *Elam v. Ethical Prescription Pharmacy, Inc.*, 422 A.2d 1288, 1289 n.2 (D.C. 1980) (contributory negligence is a complete bar to recovery)

Kentucky – Ky. Rev. Stat. Ann. § 411.320(3) (1996) (doctrine of contributory negligence applies in all product liability actions if plaintiff's behavior was a "substantial cause" of the occurrence regardless of whether the defendant was at fault or the product was defective)
North Carolina – N.C. Gen. Stat. § 99B-4 (2000) (doctrine of contributory negligence applies in all product liability actions premised on negligence or breach of warranty)
c. Variations in the Defense of Misuse
(1) Defense of Misuse Not Treated As A Separate Defense But Is Considered With Respect to Plaintiff's Fault Generally
Alaska – Alaska Stat. Ann. § 09.17.900 (2000) (fault includes "misuse of a product for which the defendant otherwise would be liable")
Minnesota– Minn. Stat. Ann. § 604.01(1a) (2000) (fault includes misuse of the product)
Washington – Wash. Rev. Code Ann. § 4.22.015 (1996) (" 'Fault' includes acts or omissions, including misuse of a product")
(2) Differences in Definition of "Misuse"
Colorado – *Armentrout v. FMC Corp.*, 842 P.2d 175, 187 (Colo. 1992) ("A manufacturer of a product is not legally responsible for injuries caused by a product if [] the product is used in a manner or for a purpose other than that which was intended")
Wyoming – *Anderson v. Louisiana–Pacific*, 859 P.2d 85, 88 (Wyo. 1993) (defining misuse as "using a product for an unintended or unforeseeable purpose")
Idaho – Idaho Code § 6–1405(3) (2001) (" 'misuse' occurs when the product user does not act in a manner that would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances")
(3) Proof of Misuse Complete Bar to Recovery Even Where Doctrine of Comparative Negligence Has Been Adopted
Arizona – Ariz. Rev. Stat. Ann. § 12–683(3) (2000) (in any product liability action, a defendant will not be found liable if the defendant demonstrates that the plaintiff's injury was the result of plaintiff's misuse of the product)
Connecticut – *Elliot v. Sears Roebuck & Co.*, 621 A.2d 1371, 1375 (Conn. App. Ct. 1993) (if defendant proves that plaintiff's misuse of the product, and not the alleged defect, was the proximate cause of plaintiff's injuries, then defendant shielded from liability)

Iowa – *Steinmetz v. Bradbury Co.*, 618 F.2d 21, 23 (8th Cir. 1980) (Iowa law) (same)
(4) Misuse Reduces Amount of Recovery
Florida – *Standard Havens Prods., Inc. v. Benitez*, 648 So. 2d 1192, 1197 (Fla. 1994) (explaining that proof of misuse in strict liability action would reduce plaintiff's recovery in proportion to plaintiff's comparative fault)
Illinois – *Frazer v. A.F. Munsterman Inc.*, 527 N.E.2d 1248, 1257 (Ill. 1988) (misuse reduces amount of recovery)
North Dakota – *Oanes v. Westgo, Inc.*, 476 N.W.2d 248, 254 (N.D. 1991 (misuse reduces amount of recovery)
(5) Variations with Respect to Whether Misuse is a Question of Law or Fact
Texas – *Houston Lighting & Power Co. v. Reynolds*, 712 S.W.2d 761, 770 (Tex. Ct. App. 1986 (jury responsible for determining whether plaintiff misused product), *rev'd on other grounds*] 765 S.W.2d 784 (Tex. 1988)
Idaho – *Watson v. Navistar Int'l-Trans. Corp.*, 827 P.2d 656, 674 (Idaho 1992) (the question of misuse is one of law for determination by the court)
D. Variations Regarding Allocation Of Duties To Judge And Jury
1. Examples Of Differences With Respect To Issues of Defectiveness Or Unreasonable Dangerousness
Connecticut – *Slepski v. Williams Ford, Inc.*, 364 A.2d 175, 178 (Conn. 1975) (issue of product's unreasonable dangerousness is to be decided by the jury)
Tennessee – *Harwell v. Am. Med. Sys. Inc.*, 803 F. Supp. 1287, 1297 (M.D. Tenn. 1992) (under Tennessee law the issue of unreasonable danger is usually a jury question)
Pennsylvania – *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1026 (Pa. 1978) (whether a product is defective or unreasonably dangerous is not "within the orbit of a factual dispute which is properly assigned to the jury"); *Dambacher v. Mallis*, 485 A.2d 408, 420 (Pa. Super. Ct. 1984) ("[T]he trial court will have to rule whether, as a matter of law, the jury could find the radial tire defective")
2. Differences With Respect To Determination Whether Warning Is Adequate
Massachusetts – *Knowlton v. Desert Med., Inc.*, 930 F.2d 116, 120 (1st Cir. 1991) (under Massachusetts law, adequacy of warning is a jury question)

Tennessee – *Goins v. Clorox Co.*, 926 F.2d 559, 561 (6th Cir. 1991) (under Tennessee law, whether a warning is adequate is usually a question for the jury)
Pennsylvania – *Mazur v. Merck & Co.*, 964 F.2d 1348, 1366 (3d Cir. 1992) (under Pennsylvania law, the determination of whether a warning is adequate is a question of law)

UNJUST ENRICHMENT
E. Examples Of State Law Variations With Respect To The Meaning Of "Unjust"
Minnesota – *Servicemaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996) (defining "unjust" to "mean illegally or unlawfully") (internal quotation marks omitted)
Illinois – *Firemen's Annuity & Benefit Fund v. Mun. Employees', Officers', & Officials' Annuity & Benefit Fund*, 579 N.E.2d 1003, 1007 (Ill. Ct. App. 1993) (expressly rejecting Minnesota's approach and holding that "a cause of action based on unjust enrichment does not require fault or illegality on the part of the defendant")
New York – *Mayer v. Bishop*, 158 A.D.2d 878, 880 (N.Y. App. Div. 1990) (illegality or fault not required for unjust enrichment)
New Hampshire – *Am. Univ. v. Forbes*, 183 A. 860, 862 (N.H. 1936) (unjust enrichment follow from "unlawful" acts); *Petrie–Clemons v. Butterfield*, 441 A.2d 1167, 1172 (N.H. 1982) (recognizing that unjust enrichment may arise when the defendant has "innocently receive[d] a benefit and passively accept[ed] it)
District of Columbia – *4934, Inc. v. District of Columbia Dep't of Employment Servs.*, 605 A.2d 50, 56 (D.C. 1992) (unjust enrichment does not require a finding of "fault on the part of the recipient of the benefit" to prove unjust enrichment)
F. Examples Of State Law Variations With Respect To The Method Of Proving Unjust Enrichment Claims
1. District of Columbia, Texas, Washington and Wyoming
These jurisdictions identify the following as the elements of unjust enrichment: (1) Valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him; and (4) under such circumstances as reasonably notified the person sought to be charged that plaintiff in performing such services or furnishing such materials was expecting to be paid by the person sought to be charged.[1]

[1] *See TVL Assocs. v. A & M Constr. Corp.*, 474 A.2d 156, 159 (D.C. 1984); *Bashara v. Baptist Mem. Hosp.*, 685 S.W.2d 307, 310 (Tex. 1985); *Bailie Communications, Ltd. v. Trend Bus. Sys., Inc.*, 810 P.2d 12, 17 (Wash. Ct. App. 1991); *Amoco Prod. Co. v. EM Nominee P'ship Co.*, 2 P.3d 534, 541-42 (Wyo. 2000).

2. Arizona, Delaware, Louisiana, and North Dakota
These states require a plaintiff to show: (1) An enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) an absence of "justification" or "cause" for the enrichment and impoverishment; and (5) the absence of a remedy provided by law.[2]
3. Variations on the Three-Element Standard
a. Idaho, Kentucky, Rhode Island and Tennessee
These states identify the following three elements for an unjust enrichment claim: (1) A benefit conferred upon the defendant by the plaintiff; (2) the defendant's appreciation of the benefit; and (3) the defendant's acceptance of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.[3]
b. Alaska, Florida, Missouri, Nevada, and Pennsylvania
These jurisdictions apply the three-element standard, with an additional qualification:
(1) A benefit conferred upon the defendant by the plaintiff; (2) the defendant's appreciation of the benefit; and (3) the defendant's ***acceptance and retention*** of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.[4]

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[2] *See Guarantee Elec. Co. v. Big Rivers Elec. Corp.*, 669 F. Supp. 1371, 1380-81 (W.D. Ky. 1987) (applying Kentucky law); *Cmty. Guardian Bank v. Hamlin*, 898 P.2d 1005, 1008 (Ariz. Ct. App. 1995); *Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 393-94 (Del. Ch. 1999); *Minyard v. Curtis Prods., Inc.*, 205 So.2d 422, 432 (La. 1967); *Apache Corp. v. MDU Res. Group, Inc.*, 603 N.W.2d 891, 894-95 (N.D. 1999).

[3] *See Aberdeen-Springfield Canal Co. v. Peiper*, 982 P.2d 917, 923 (Idaho 1999); *Anthony Corrado, Inc. v. Menard & Co. Bldg. Contractors*, 589 A.2d 1201, 1201-02 (R.I. 1991); *Paschall's, Inc. v. Dozier*, 407 S.W.2d 150, 155 (Tenn. 1966).

[4] *See State Dep't Rev., Child Support Enforcement Div. v. Mitchell*, 930 P.2d 1284, 1289 (Alaska 1997) (emphasis added); *Swindell v. Crowson*, 712 So. 2d 1162, 1163 (Fla. Dist. Ct. App. 1998) (per curiam); *Ernst v. Ford Motor Co.*, 813 S.W.2d 910, 918 (Mo. Ct. App. 1991) *Topaz Mut. Co. v. Marsh*, 839 P.2d 606, 613 (Nev. 1992); *Styer v. Hugo*, 619 A.2d 347, 350 (Pa. Super. Ct. 1993).

c. Kansas, Maine, Maryland, Utah, and Wisconsin
These states define unjust enrichment in terms of the three–element standard, but with two qualifications:
(1) A benefit conferred upon the defendant by the plaintiff; (2) the defendant's ***appreciation or knowledge*** of the benefit; and (3) the defendant's ***acceptance or retention*** of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.[5]
G. Examples of Differences Among States With Respect to the Relevance of the Defendant's Knowledge of the Benefit
1. Examples of States That Require Plaintiff To Establish Defendant's Knowledge of the Benefit
Alabama – *Utah Foam Prods., Inc. v. Polytec, Inc.*, 584 So.2d 1345, 1350 (Ala. 1991) (requiring that plaintiff establish that defendant had knowledge of the benefit conferred upon him in order to prevail)
Kansas – *J.W. Thompson Co. v. Welles Prods. Corp.*, 758 P.2d 738, 745 (Kan. 1988) (same)
Maine – *Landry v. Landry*, 697 A.2d 843, 845 (Me. 1997) (same)
Maryland – *County Comm'rs of Caroline County v. J. Roland Dashiell & Sons, Inc.*, 747 A.2d 600, 607 n.7 (Md. 2000) (same)
New Mexico– *Ontiveros Insulation Co. v. Rawson, Inc.*, No. 19817, 2000 WL 772729, at *3 (N.M. Ct. App. May 15, 2000) (same)
Minnesota – *Servicemaster of St. Cloud*, 544 N.W.2d 302, 306 (Minn. 1996) (same)
North Carolina – *Booe v. Shadrick*, 369 S.E.2d 554, 556–56 (N.C. 1988) (same)
Oregon – *Edward D. Jones & Co. v. Mishler*, 983 P.2d 1086, 1101 (Or. Ct. App. 1999) (same)
South Dakota– *Juttelstad v. Juttelstad*, 587 N.W.2d 447, 451 (S.D. 1998) (same)
Utah – *Am. Towers Owners Ass'n, Inc. v. CCI Mech., Inc.*, 930 P.2d 1182, 1192 (Utah 1996) (same)

[5] *See J.W. Thompson Co. v. Welles Prods. Corp.*, 758 P.2d 738, 745 (Kan. 1988); *Landry v. Landry*, 697 A.2d 843, 845 (Me. 1997); *County Comm'rs of Caroline County v. J. Roland Dashiell & Sons, Inc.*, 747 A.2d 600, 607 n.7 (Md. 2000); *Am. Towers Owners Ass'n, Inc. v. CCI Mech., Inc.*, 930 P.2d 1182, 1192 (Utah 1996); *Watts v. Watts*, 405 N.W.2d 303, 313 (Wis. 1987).

Wisconsin– *Watts v. Watts*, 405 N.W.2d 303, 313 (Wis. 1987) (same)
2. Examples of States That Do Not Require Defendant Have Knowledge of the Benefit
Colorado – *DCB Constr. Co. v. Cent. City Dev. Co.*, 965 P.2d 115, 119–120 (Colo. 1998) (en banc) (unjust enrichment occurs when "(1) at plaintiff's expense, (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying")
New York – *Lake Minnewaska Mountain Houses Inc. v. Rekis*, 259 A.D.2d 797, 798 (N.Y. App. Div. 1999) (citing *Paramount Film Distrib. Corp. v. New York*, 30 N.Y.2d 415, 421 (1972) (unjust enrichment requires only that plaintiff prove "that (1) the defendant was enriched (2) at plaintiff's expense, and (3) that 'it is against equity and good conscience to permit . . . defendant to retain what is sought to be recovered'" to prevail))
Illinois – *HPI Health Case Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. 1989)(unjust enrichment occurs when "the defendant has unjustly retained a benefit to the plaintiff's detriment, and . . . defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience")
Michigan – *B & M Die Co. v. Ford Motor Co.*, 421 N.W.2d 620, 622 (Mich. Ct. App. 1988) (unjust enrichment requires the "(1) receipt of a benefit by the defendant from the plaintiff, and (2) which benefit it is inequitable that the defendant retain")

EXPRESS WARRANTY
II. VARIATIONS IN GOVERNING EXPRESS WARRANTY PRINCIPLES
A. Examples Of State Variations With Respect To What Statements Suffice To Create An Express Warranty
Missouri – *Chase Resorts, Inc. v. Johns-Manville Corp.*, 476 F. Supp. 633, 638 (E.D. Mo. 1979) (statement that irrigation system "would provide years of trouble free service" did not create an express warranty because the length and parameters of the trouble free service were not "susceptible of exact knowledge"), *aff'd*, 620 F.2d 203 (8th Cir. 1980)
Wisconsin – *Ewers v. Eisenzopf*, 276 N.W.2d 802, 805 (Wis. 1979) (test is " 'whether [the seller] made an affirmation of fact the natural tendency of which was to induce the sale and which did in fact induce it' ") (citation omitted)
Ohio – *Jones v. Kellner*, 451 N.E.2d 548, 549 (Ohio Ct. App. 1982) (a "positive statement of the quality of the goods is an express warranty if the natural tendency of the statement is to induce a buyer to purchase the goods, and if the buyer purchases the goods in reliance thereon") (citation omitted)
Nebraska – *Mennonite Deaconess Home & Hosp., Inc. v. Gates Eng'g Co.*, 363 N.W.2d 155, 161 (Neb. 1985) (the "test is 'whether the seller assumes to assert a fact of which the buyer is ignorant, or whether he merely . . . expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment' " (citation omitted)
B. Examples Of Variations In Actual Reliance Requirement
New Jersey – *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 569 n.34 (3d Cir. 1990), *aff'd in part & rev'd in part*, 505 U.S. 504 (1992) ("in the context of advertisements claimed to be warranties, a plaintiff buyer [in New Jersey] must first prove that she saw the advertisements. This raises a (rebuttable) presumption of belief, which in turn raises an irrebuttable presumption of reliance. Next, a defendant seller may rebut the presumption of reliance, but only by proving that the plaintiff disbelieved the advertisement . . . . Successfully proving disbelief creates a new rebuttable presumption of nonreliance. Finally, the plaintiff may rebut this presumption by proving reliance directly")
Florida – *State Farm Ins. Co. v. Nu Prime Roll-A-Way, Inc.*, 557 So. 2d 107, 108 (Fla. Dist. Ct. App. 1990) (a "seller's representations in newspaper advertisements . . . [may] constitute an express warranty . . . to one who, in making the purchase, relies thereon to his injury")
Mississippi – *Global Truck & Equip. Co. v. Palmer Mach. Works*, 628 F. Supp. 641, 651 (N.D. Miss. 1986) (Mississippi law) (no warranty was created by affirmations because plaintiff did not prove that he relied on the seller's statement)
Illinois – *Felley v. Singleton*, 705 N.E.2d 930, 934 (Ill. App. 2d 1999) (while holding that showing of reliance not necessary, court states, "[w]e recognize

that Illinois courts have not always consistently stated these principles")
Colorado – *Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 644-45 (10th Cir. 1991) (Colorado law) (express warranty created by statements in seller's brochure even though buyer did not rely on the statements)
Virginia – *Daughtrey v. Ashe*, 413 S.E.2d 336, 338-39 (Va. 1992) (buyer need not prove reliance on description because the UCC was intended to modify the traditional requirement of reliance)
Washington – *Baughn v. Honda Motor Co.*, 727 P.2d 655, 669 (Wash. 1986) (even though reliance need not be proven, the plaintiff must at least be aware of representations to recover for breach of express warranty)
C. Examples Of Variations With Respect To Whether Post-Sale Representations Can Create Express Warranties
1. Post-Sale Representations May Create Express Warranties
California, Utah – *Downie v. Abex Corp.*, 741 F.2d 1235, 1240-41 (10th Cir. 1984) (California and Utah law) (warranty was created when post-sale representations about a product were made in an effort to promote future sales)
Maryland – *Klein v. Sears Roebuck & Co.*, 773 F.2d 1421, 1424 (4th Cir. 1985) (Maryland law) (valid express warranty was created by salesman's post-sale representations because purchase of mower was conditioned on subsequent inspection of the property by the salesman)
2. Post-Sale Representations Cannot Create Express Warranties
Arizona – *Flory v. Silvercrest Indus., Inc.*, 633 P.2d 383, 390 (Ariz. 1981) (post-bargain representations were not express warranties because of the absence of reliance by buyer)
Colorado – *Anderson v. Heron Eng'g Co.*, 604 P.2d 674, 676 (Colo. 1979) (in order for statement made in seller's brochure to constitute an express warranty, buyer must have "seen or otherwise relied on" it at the time of purchase)
Maine – *Cuthbertson v. Clark Equip. Co.*, 448 A.2d 315, 321 (Me. 1982) (owner's manual not seen by buyer until after the purchase was not part of the "basis of the bargain" and hence did not create an express warranty)

III. VARIATIONS IN OTHER STANDARDS APPLICABLE TO BOTH EXPRESS AND IMPLIED WARRANTY CLAIMS[6]
A. States Follow Differing Rules Concerning The Element Of Notice Of Breach
1. Examples Of States That Require Notice To Be Given Directly To Manufacturer
Arkansas – *Cotner v. Int'l Harvester Co.*, 545 S.W.2d 627, 630 (Ark. 1977) (requiring notice to manufacturer)
Oregon – *Redfield v. Mead, Johnson & Co.*, 512 P.2d 776, 781 (Or. 1973) (requiring notice to manufacturer)
Wyoming – *W. Equip. Co. v. Sheridan Iron Works, Inc.*, 605 P.2d 806, 810-11 (Wyo. 1980) (same)
2. Examples Of States In Which Notice To Immediate Seller Is Sufficient
Colorado – *Cooley v. Big Horn Harvestore Sys., Inc.*, 813 P.2d 736, 742 (Colo. 1991) (purchaser injured by product not required to give notice to remote manufacturer before initiating litigation)
Minnesota – *Church of the Nativity of Our Lord v. Watpro, Inc.*, 491 N.W.2d 1, 6 (Minn. 1992) (notice requirement to manufacturer satisfied by notice to distributor if manufacturer and distributor are in agency relationship), *rev'd on other grounds*, 615 N.W.2d 302 (Minn. 2000)
3. Examples Of Variations With Respect To Time Period Within Which Notice Must Be Given
a. Examples Of States Where Delays Of Several Months Have Barred Suit
District of Columbia – *Mariner Water Renaturalizer, Inc. v. Aqua Purification Sys., Inc.*, 665 F.2d 1066, 1069 (D.C. Cir. 1981) (District of Columbia law) (delay of five to eight weeks in notification held untimely)
Massachusetts – *P & F Constr. Corp. v. Friend Lumber Corp.*, 575 N.E.2d 61, 64 (Mass. App. Ct. 1991) (3-1/2 months delay untimely)
Oregon – *Wagner Tractor Inc. v. Shields*, 381 F.2d 441, 445 (9th Cir. 1967) (Oregon law) (4-1/2 month delay in giving notice held untimely)

[6] For additional examples of variations in law relating to implied warranty, see Tab D of this submission.

b. Examples Of States That Tolerate Longer Delays
Florida – *Lafayette Stabilizer Repair, Inc. v. Mach. Wholesalers, Corp.*, 750 F.2d 1290, 1294 (5th Cir. 1985) (Florida law) (delay of six months not untimely)
North Carolina – *Maybank v. S.S. Kresge Co.*, 273 S.E.2d 681, 685 (N.C. 1981) (delay of three years held not to have been "unreasonable as a matter of law")
South Dakota – *Opp v. Nieuwsma*, 458 N.W.2d 352, 356-57 (S.D. 1990) (four month delay not untimely)
B. States Differ As To The Availability And Content Of Affirmative Defenses In Warranty Cases
1. Examples Of Variations In Product Misuse Inquiry
North Carolina – N.C. Gen. Stat. § 99B-4(1) (2000) (no liability if "[t]he use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings delivered with, appearing on, or attached to the product")
District of Columbia – *Payne v. Soft Sheen Prods., Inc.*, 486 A.2d 712, 725-26 (D.C. 1985) ("[p]roduct 'misuse' is defined as use of a product in a manner that could not reasonably be foreseen by the defendant") (citation omitted)
Idaho – Idaho Code § 6-1405(3)(a) (2000) (" 'Misuse' occurs when the product user does not act in a manner that would be expected of an ordinary reasonably prudent person")
2. Examples Of Variations With Respect To Availability And Form Of Contributory Or Comparative Negligence As Defenses In Warranty Actions
New Hampshire – *Stephan v. Sears Roebuck & Co.*, 266 A.2d 855, 858 (N.H. 1970) ("contributory negligence is a defense to an action for breach of warranty")
Michigan – *In re Certified Questions*, 331 N.W.2d 456, 462 (Mich. 1982) (applying Michigan's comparative negligence statute to breach of warranty; plaintiff's recovery is reduced by the amount of his or her own fault, no matter how great it is)
Arkansas – Ark. Code Ann. § 16-64-122 (Michie 1999) (comparative fault statute applies by its terms to breach of warranty, and bars recovery by a plaintiff whose fault *is equal to or greater than* that of the defendant)
Delaware – Del. Code Ann. tit. 10, § 8132 (2000) (recovery denied if comparative negligence is greater than 50%)

Colorado – *Hensley v. Sherman Car Wash Equip. Co.*, 520 P.2d 146, 148 (Colo. Ct. App. 1974) ("The concept of contributory negligence, as it is known in negligence case law . . . has no place in actions premised on breach of warranty")
Texas – *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 329 (Tex. 1978) (unlike Texas system of modified comparative negligence, buyer in warranty action is entitled to recover that portion of the damages caused by the unsuitable product, even if the buyer's negligence or fault constitutes a greater cause of the damages than the seller's breach)
Arkansas – *Little Rock Elec. Contractors v. Okonite Co.*, 744 S.W.2d 381, 382 (Ark. 1988) (comparative fault statute only applies to actions for wrongful death or injury to person or property)
C. States Differ As To The Availability Of Incidental And Consequential Damages
New Jersey – *Gladden v. Cadillac Motor Div.*, 416 A.2d 394, 408 (N.J. 1980) (no presumption of unconscionability where tire manufacturer limited damages)
Mississippi – *See* Miss. Code Ann. §§ 11-7-18, 75-2-719(4) (1993) (Mississippi appears to prohibit implied warranty remedy limitations altogether)
Utah – *Schurtz v. BMW of N. Am.*, 814 P.2d 1108, 1114 (Utah 1991) (provisions limiting incidental and consequential damages are generally unconscionable in consumer settings)
Connecticut – *McKernan v. United Tech. Corp.*, 717 F. Supp. 60, 69 (D. Conn. 1989) (Connecticut law) (warranty disclaimer of consequential damages is invalid if the defendant's limited remedy fails of its essential purpose)
Tennessee – *Aquascene Inc. v. Noritsu Am. Corp.*, 831 F. Supp. 602, 604 (M.D. Tenn. 1993) (Tennessee courts would likely read consequential damages and "failure of essential purpose" subsections as distinct and separate)
Illinois – *Smith v. Navistar Int'l Transp. Corp.*, 714 F. Supp. 303, 308 (N.D. Ill. 1989) (Illinois law) (disclaimer not binding if buyer can demonstrate that warranty fails of its essential purpose *and* that the parties did not contractually allocate all the attendant risks), *aff'd*, 957 F.2d 1439 (7th Cir. 1992)
D. States Differ As To The Standards For Determining Whether Warranty Terms Are Unconscionable
Arkansas – *Hunter v. Texas Instruments, Inc.*, 798 F.2d 299, 303 (8th Cir. 1986) (in determining unconscionability a court must consider the following factors: "[(1)] the general commercial background, [(2)] commercial needs in the trade or particular case, [(3)] the relative bargaining position of the parties, and [(4)] and other circumstances at the time the contract was made")

Wyoming – *Hutton v. Deere & Co.*, No. 99-8053, 2000 U.S. App. LEXIS 6285, *14-15 (10th Cir. Apr. 5, 2000) (the unconscionability inquiry in Wyoming involves the consideration of six elements: "(1) Was a party deprived of a meaningful choice as to whether to enter into the contract? (2) Was a party compelled to accept the terms of the contract? (3) Was there an opportunity for a meaningful negotiation? (4) Was there a great inequality of bargaining power? (5) Was one party readily subject to deception? [and,] (6) Was one party in some manner surprised by fine print or concealed terms?")

IMPLIED WARRANTY
E. Examples Of States That Would Bar The Implied Warranty Claims Of Non-Incident Plaintiffs Because Of Lack Of Vertical Privity
Alabama – *Rhodes v. Gen. Motors Corp.*, 621 So. 2d 945, 947 (Ala. 1993) ("without privity of contract, there is no right of action against a manufacturer for direct economic loss" in Alabama)
Arizona – *Flory v. Silvercrest Indus., Inc.*, 633 P.2d 383, 388 (Ariz. 1981) (Arizona maintains a "requirement of privity of contract to recover for breach of implied and express warranties under the Arizona Uniform Commercial Code")
California – *Osborne v. Subaru of Am.*, 243 Cal. Rptr. 815, 820-21 (Cal. Ct. App. 1988) ("[i]n California, [vertical] privity is required" to sue a remote automobile distributor under the UCC)
Connecticut – *Keollmer v. Chrysler Motor Corp.*, 276 A.2d 807, 812 (Conn. Cir. Ct. 1970) (imposing vertical privity requirement when only economic loss is involved)
Florida – *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 788 F. Supp. 1203, 1206 (S.D. Fla. 1992) ("[p]rivity of contract between plaintiff and defendant is an essential element of the breach of implied warranty cause of action" in claim for economic loss), *aff'd*, 67 F.3d 901 (11th Cir. 1995)
Georgia – *Ford Motor Co. v. Lee*, 224 S.E.2d 168, 171 (Ga. Ct. App.), *aff'd in part and rev'd in part*, 229 S.E.2d 379 (Ga. 1976); *Mullins v. M.G.D. Graphics Sys. Group*, 867 F. Supp. 1578, 1584 (N.D. Ga. 1994) ("[u]nder Georgia law, [p]laintiff cannot recover [for breach of implied warranty] unless [he] can demonstrate privity of contract")
Hawaii – *Larsen v. Pacesetter Sys., Inc.*, 837 P.2d 1273, 1284 (Haw. 1992) (privity required in implied warranty where "purely economic loss is the gravamen of the complaint")
Idaho – *Oats v. Nissan Motor Corp. in U.S.A.*, 879 P.2d 1095, 1102 (Idaho 1994) ("[t]he UCC's warranty provisions were not meant to govern cases . . . where there is no privity of contract between the plaintiff and the defendant")
Illinois– *Thomas v. Bombardier-Rotax Motorenfabrik*, 869 F. Supp. 551, 556 & n.7 (N.D. Ill. 1994) ("[g]enerally plaintiffs suing for breach of warranty in Illinois must establish both vertical and horizontal privity" and the Illinois Supreme Court has "held that privity is required when the plaintiff is suing

to recover for purely economic injury")
Indiana – *Horn v. A.O. Smith Corp.*, 884 F. Supp. 1226, 1244 (N.D. Ind. 1994) (privity is "a requirement for maintaining a claim for breach of implied warranties" in Indiana), *rev'd on other grounds*, 50 F.3d 1365 (7th Cir. 1995)
Iowa – *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103, 108 (Iowa 1995) ("an extension of implied warranty theories to non-privity buyers . . . would spawn numerous problems in the operation of the Uniform Commercial Code") (citation omitted)
Kansas – *Prof'l Lens Plan, Inc. v. Polaris Leasing Corp.*, 675 P.2d 887, 898-99 (Kansas 1984) (requiring privity when only economic loss is involved)
Michigan – *Nat'l Sand Inc., v. Nagel Constr. Inc.*, 451 N.W.2d 618, 620 (Mich. 1990) (lack of vertical privity bars contract-based implied warranty claim)
New York – *Mazzuocola v. Thunderbird Prods. Corp.*, No. 90-CV-0405, 1995 WL 311397, at *2 (E.D.N.Y. May 16, 1995) (New York "maintaining what appears to be the majority position, requires privity")
North Carolina – *Sharrad, McGee & Co. v. Suz's Software, Inc.*, 396 S.E.2d 815, 818 (N.C. Ct. App. 1990) (In North Carolina, "the general rule is that privity is required to assert a claim for breach of implied warranty involving only economic loss")
Ohio – *St. Paul Fire & Marine Ins. Co. v. R.V. World, Inc.*, 577 N.E.2d 72, 75 (Ohio Ct. App. 1989) ("a long line of cases has developed the principle that absent privity, a plaintiff cannot bring a contract action for breach of implied warranty")
Oregon – *State ex rel. W. Seed Prod. Corp. v. Campbell*, 442 P.2d 215, 217-18 (Or. 1968) (requiring vertical privity, at least where only economic loss is involved)
Rhode Island – *Henry v. John W. Eshelman & Sons*, 209 A.2d 46, 47 (R.I. 1965) (vertical privity required where economic injury involved).
Tennessee – *McCrary v. Kelly Technical Coatings, Inc.*, 1985 WL 75663, at *3 (Tenn. Ct. App. Aug. 28, 1985) ("[p]rivity has been abolished in [implied warranty] actions in Tennessee *only* with regard to 'personal injury or property damage'" and not with respect to purely economic losses) (emphasis added); *Walker Truck Contractors, Inc. v. Crane Carrier Co.*, 405 F. Supp. 911, 919 n.12 (E.D. Tenn. 1975) (the ultimate purchaser cannot recover purely "economic losses" against the remote manufacturer "because T.C.A. [29-34-104] . . . abolishes privity as a defense only with respect to actions for personal injuries or property damage")
Utah – *Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc.*, 794 P.2d 11, 18 n.8 (Utah 1990) (waiving privity requirement only with respect to certain beneficiaries of seller's warranty)

Vermont – *Mainline Tractor & Equip. Co., v. Nutrite Corp.*, 937 F. Supp. 1095, 1108 (D. Vt 1996) (Vermont has not eliminated vertical privity requirement)
Virginia – *Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc.*, 491 S.E.2d 731, 734 (Va. 1997) (where no injury to persons or property involved, privity of contract required)
Washington – *Baughn v. Honda Motor Co.*, 727 P.2d 655, 669 (Wash. 1986) ("[c]ontractual privity between buyer and seller traditionally has been required before a plaintiff may maintain [] an action [for breach of express or implied warranty] under the Code")
Wisconsin – *Northridge Co. v. W.R. Grace & Co.*, 471 N.W.2d 179, 187 (Wis. 1991) ("[p]rivity is a requirement for a cause of action based on implied warranty")
F. Examples Of Other Variations With Respect To Privity
1. Owners Of Used Vehicles
Pennsylvania - *Graub v. David*, 1974 WL 21710 (Pa. Ct. C.P. May 23, 1974) (Pennsylvania law does not "extend a seller's warranty to subsequent purchasers").
2. Business Purchasers
Kansas – *see* Kan. Stat. Ann. § 50-639 (2000) (permitting implied warranty claims in the absence of privity by consumers, but not necessarily by businesses)
Oregon – *Dravo Equip. Co. v. German*, 698 P.2d 63, 65 (Or. Ct. App. 1985) (privity required in Oregon in suits for economic loss for both express and implied warranties); *but see* Or. Rev. Stat. § 72-8020 (1999) (Oregon Sale of Consumer Goods Act) (abrogating privity requirement with respect to purchases for personal use: "the manufacturer of a consumer good to be sold at retail in [Oregon] gives . . . the manufacturer's implied warranty of merchantability")
G. Examples Of State Variation In The Standard Of Merchantability For New Goods
Kansas – *see* Kan. Stat. Ann. § 50-624(e) (2000) ("'merchantable' means, in addition to the qualities prescribed in Kan. Stat. Ann. § 84-2-314 . . . conformity in all material respects with applicable state and federal statutes and regulations establishing standards of quality and safety")
West Virginia – *see* W. Va. Code § 46A-6-102(c) (2000) (in addition to definition in W. Va. Code § 46-2-314 (1995) "merchantable" means that "goods

conform in all material respects to applicable state and federal statutes and regulations," and "that the goods are in good working order and will operate properly in normal usage for a reasonable period of time")
Massachusetts – *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 190 (1st Cir. 1980) ("[u]nder Massachusetts law the question of fitness for ordinary purposes is largely one centering around reasonable *consumer* expectations") (emphasis added)
New York – *Denny v. Ford Motor Co.*, 662 N.E.2d 730 (N.Y. 1995), *aff'd*, 79 F.3d 12 (2d Cir. 1996) (implied warranty "inquiry focuses on [consumer] expectations" and the "'ordinary purpose' for which the product was marketed and sold to *the plaintiff*" was suburban driving, not offroad use) (emphasis added)
Georgia – *Horne v. Claude Ray Ford Sales, Inc.*, 290 S.E.2d 497, 499 (Ga. Ct. App. 1982) (damage to a new car that does not affect a vehicle's "usefulness or its driveability" will not affect merchantability)
Illinois – *Overland Bond & Inv. Corp. v. Howard*, 292 N.E.2d 168, 172-73 (Ill. App. Ct. 1972) (merchantable vehicle "should be in a safe condition and substantially free of defects")
New Hampshire – *Fitzgerald-Hicks Dodge, Inc.*, 430 A.2d 144, 148 (N.H. 1981) (unmerchantable vehicle is "not of average quality or fit for the ordinary purpose for which an automobile is used")
Texas – *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 444 (Tex. 1989) (holding that "[i]n the context of an implied warranty of merchantability case the word 'defect' means a condition of the goods that renders them unfit for the ordinary purposes for which they are used because of a lack of something necessary for adequacy")
Vermont – *Tracy v. Vinton Motors, Inc.*, 296 A.2d 269, 272 (Vt. 1972) (merchantability is "primarily directed at the operative essentials of a product," including "operational safety")
H. Examples Of Variations In Standard Of Merchantability For Used Goods
1. No Distinction Between New And Used Goods
South Dakota – *Crandell v. Larkin & Jones Appliance Co.*, 334 N.W.2d 31, 36 (S.D. 1983) (holding that "[i]f the framers of the U.C.C. had intended to exclude . . . used or secondhand goods from any implied warranties, merchantability or otherwise, they could easily have done so") (citation omitted)
Idaho – *Lee v. Peterson*, 716 P.2d 1373, 1375 (Idaho Ct. App. 1986) ("[t]he warranty [of merchantability] extends to used goods")
Illinois – *Overland Bond & Inv. Corp. v. Howard*, 292 N.E.2d 168, 171-72 (Ill. App. Ct. 1972) ("[d]efects which have been held to make operation of a

new automobile unfit and thereby cause a breach of implied warranties may result in the breach of the same warranties on a used automobile")
Missouri – *Brazeal v. Craig*, 683 S.W.2d 329, 330 (Mo. Ct. App. 1984) ("extend[ing] an implied warranty of merchantability to used or second-hand automobiles")
2. Examples Of States In Which Implied Warranty Of Merchantability Does Not Apply To Used Goods
Texas – *Southerland v. Northeast Datsun, Inc.*, 659 S.W.2d 889, 891 (Tex. Ct. App. 1983) ("[u]nder Texas law, no implied warranty to the sale of used goods attaches where they are purchased with knowledge that they were used")
Tennessee – *McGee v. Nashville White Trucks, Inc.*, 633 S.W.2d 311 (Tenn. Ct. App. 1981) (no warranty on used truck that failed to operate within 45 days of purchase)
3. Examples Of States That Apply An Adjusted Standard Of Merchantability To Used Goods
Kansas – *Int'l Petroleum Serv., Inc. v. S&N Well Serv., Inc.*, 639 P.2d 29, 34 (Kan. 1982) ("the extent of the [implied warranty] obligation of a merchant who sells used goods depends on the circumstances of the transaction")
Mississippi – *Beck Enters., Inc. v. Hester*, 512 So. 2d 672, 676 (Miss. 1987) ("[u]sed goods are reasonably expected to require more maintenance and repair and their quality should not be measured on the same scale as that of new goods . . . [i]f [used goods] conform to the quality of other similar used goods, they will normally be merchantable")
Virginia – *Whittle v. Timesavers, Inc.*, 614 F. Supp. 115, 118 (W.D. Va. 1985) (Virginia law) ("the warranty which attaches to a used good obviously takes into account normal wear and tear")
Washington – *Testo v. Russ Dunmire* Oldsmobile, *Inc.*, 554 P.2d 349, 354 (Wash. Ct. App. 1976) (to be merchantable, used car "must be in reasonably safe condition and substantially free of defects which render it inoperable")
4. Examples Of Variations In Duration Of Implied Warranty
California – Cal. Civ. Code § 1791.1(c) (West 1995) ("in no event shall [an] implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer")
Alabama – *Century 21-Reeves Realty, Inc. v. McConnell Cadillac, Inc.*, 626 So. 2d 1273, 1275 (Ala. 1993) (manufacturer not liable where it expressly limited duration of implied warranty of merchantability) (*citing* Ala. Code. Ann. § 7-2-316 (2000), *rev'd on other grounds*, 655 So. 2d 909, 919 (Ala. 1994)

District of Columbia – *Patton v. Chrysler Motors Corp.*, No. SC 21171-88, 1990 WL 317473, at *4 (D.C. Super. Ct. May 30, 1990) (District of Columbia "restrict[s] a merchant's ability to limit the duration of implied warranties") (*citing* D.C. Code § 28:2-316)
5. Examples Of State Law Variations With Respect To Measure Of Diminution-In-Value Damages Under UCC § 2-714(2)
Georgia – *Chrysler Corp. v. Marinari*, 339 S.E.2d 343, 345-46 (Ga. Ct. App. 1985) (plaintiffs may produce evidence of the difference in value at the time of acceptance and at no other time)
Virginia – *Wharton, Aldhizer & Weaver v. Savin Corp.*, 350 S.E.2d 635, 636-37 (Va. 1986) (same)
Mississippi– *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, 415 So. 2d 1024, 1029 (Miss. 1982) (permitting evidence of difference in value at a time subsequent to acceptance)
South Carolina – *Ellison v. Heritage Dodge, Inc.*, 320 S.E.2d 716, 717-18 (S.C. Ct. App. 1984) (same)

STATE CONSUMER PROTECTION ACTS

A. Variations In Prohibited Conduct In State Consumer Protection Acts ("CPAs")
1. Examples Of CPAs That Focus Narrowly On "Deceptive" Behavior
Georgia - Ga. Code Ann. § 10-1-372 (2000) (prohibiting deceptive practices).
Kansas - Kan. Stat. Ann. § 50-626 (2000) (prohibiting deceptive acts).
South Dakota - S.D. Codified Laws Ann. § 37-24-6 (2001) (prohibiting deceptive acts).
2. Examples Of CPAs That Prohibit Broader Categories Of Conduct
Alabama - Ala. Code § 8-19-3 (1999) (prohibiting *unconscionable* or deceptive acts or practices).
Alaska - Alaska Stat. § 45.50.471 (1999) (prohibiting *unfair* or deceptive acts).
Florida - Fla. Stat. Ann. § 501.201 (2000) (prohibiting *unconscionable* or *unfair* or deceptive acts).
Mississippi - Miss. Code Ann. § 75-24-5 (2001) (prohibiting *unfair* or deceptive acts).
South Carolina - S.C. Code Ann. § 39-5-20 (2000) (prohibiting *unfair* or deceptive acts).
3. Examples Of CPAs That Proscribe Specific Acts And Practices
California - Cal. Civ. Code § 1770(a) (2000) (specifically proscribes 23 itemized activities, including "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities which they do not have" or "[r]epresenting that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another").
New Jersey - N.J. Rev. Stat. § 56:8-2 (2000) (proscribes several broad categories of behavior, including "any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate").

4. Examples Of CPAs That Contain General Prohibitions On Conduct Without Enumerating Specific Prohibited Acts
Florida - Fla. Stat. Ann. § 501.204 (2000) (stating that "[u]nfair methods of competition, unconscionable acts or practice and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful" and referencing the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), for interpretive guidance).
B. Variations In Threshold Issues Arising Under State CPAs
1. Private Right Of Action Under The CPA
a. Examples Of CPAs That Expressly Recognize A Private Right Of Action
Michigan - Mich. Comp. Laws § 19.418(11) (1995) (recognizing private right of action).
New Jersey - N.J. Stat Ann. § 56:8-2.12 (1995) (authorizing private right of action).
Oregon - Or. Rev. Stat. § 646.150 (1999) (allowing private action for damages).
b. Examples Of CPAs That Authorize A Private Right Of Action For Damages Only
Arkansas - Ark. Code Ann. § 4-88-113(f) (1999).
Oregon - Or. Rev. Stat. § 646.150 (1999).
c. Examples Of Jurisdictions Where Courts Have Implied A Private Right Of Action Where The CPA Does Not Expressly Authorize One
Arizona - *Sellinger v. Freeway Mobile Home Sales, Inc.*, 521 P/2d 1119, 1122 (Ariz. 1974) (sanctioning private right of action).
Delaware - *Young v. Joyce*, 351 A.2d 857, 859 (Del. Super. Ct. 1975) (statutory purpose supports recognition of private cause of action); *Edwards v. Porter*, Civ. A. No. 88C-OC-174, 1991 WL 165877, *8 (Del. Super. Ct. 1991) (as consumer protection bill, Deceptive Trade Practices Act gives an individual a private cause of action); *but see Wald v. Wilmington Trust Co.*, 555 A.2d 853, 854 (Del. Super. Ct. 1988) (statute meant to provide remedy for injuries to business interests, rather than for harm to individuals).
d. Examples Of Jurisdictions Where The Courts Have Not Yet Determined Whether A Private Right Of Action Exists When The CPA Does Not Expressly Authorize One

Iowa - Iowa's CPA is part of its penal code and a violation is characterized as theft. *See* Iowa Code Ann. § 714.16 (2000). No court has explicitly ruled on whether a corresponding private right of action exists.
e. Examples Of Jurisdictions Where The Existence Of A Private Right Of Action Under The CPA Has Changed Over Time
North Dakota - N.D. Cent. Code § 51-15-09 (1999) (providing for a private right of action *after* July 7, 1991).
2. Definition of "Consumers" Under the CPA Vary
a. Examples Of CPAs That Define A "Consumer" As A Person Buying Goods Or Services For Personal, Family, Or Household Use
Alabama - Ala. Code § 8-19-3(2) (2000) ("[a]ny natural person who buys goods or services for personal, family or household use")
California - Cal. Civ. Code § 1761(d) (2000) ("an individual who seeks or acquires … any goods or services for personal, family, or household purposes").
Georgia - Ga. Code Ann. § 10-1-392(3) (2000) ("means the sale … primarily for personal, family, or household purposes").
b. Examples Of CPAs That Use More Narrow Definitions Of Consumer
Hawaii - *Paulson, Inc. v. Bromar, Inc.*, 775 F. Supp. 1329, 1339 (D. Haw. 1991) (defining consumers as "natural person … who commits money, property, or services in a personal investment").
c. Examples Of CPAs That Use More Expansive Definitions Of Consumer That Include Purchases Of Products For Agricultural Use
Maryland - Md. Com. Law Code Ann. § 13-101(2)(d) (2000) (defining consumer transactions as sales "primarily for personal, household, family, or agricultural purposes").
West Virginia - W. Va. Code § 46A-6-102(b) (2000) (defining a consumer transaction as a "sale or lease to a natural person or persons for a personal, family, household or agricultural purpose").
d. Examples Of CPAs That Include Purchases By Businesses In Their Definition Of Consumer Transactions

New Jersey - N.J. Rev. Stat. Ann. § 56:8-2 (2000) (statute encompasses the "sale or advertisement of any merchandise or real estate," not limiting transactions to individuals).
Kansas - Kan. Stat. Ann. § 50-624(b) (2000) (defining consumer as "an individual or sole proprietor who seeks or acquires property or services for personal, family, household, business or agricultural purposes").
Texas - Tex. Bus. & Com. Code Ann. § 17.45(4) (2001) (consumer "means an individual, partnership, corporation … except that term does not include a business consumer that has assets of $ 25 million or more, or that is owned or controlled by a corporation or entity with assets of $ 25 million or more").
Utah - Utah Code Ann. § 13-11-3(2) (2000) (consumer transaction "means a sale … to a person for primarily personal, family, or household purposes, or for purposes that relate to a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged").
e. Examples Of CPAs That Differ On Whether A Consumer Transaction Should Be Determined On An Objective Basis Or A Subjective Basis
Oregon - *Miller v. Hubbard-Wray, Co. Inc.*, 630 P.2d 880, 885 (Or. Ct. App. 1981) ("There was no evidence to support the allegation that hay bales are goods 'customarily bought by a substantial number of purchasers for personal, family, or household uses.' … Nor is it a fact of such 'general notoriety' that we can take judicial notice of it") (citations omitted).
Pennsylvania - *Valley Forge Towers S. Condo. v. Ron-Ike Foam Insulators, Inc.*, 574 A.2d 641, 648 (Pa. Super. Ct. 1990) ("Mameco's focus upon the type of product involved is misplaced. The restriction included in the act addresses itself solely to the purpose of the purchase, not the type of product purchased."), *aff'd*, 605 A.2d 798 (Pa. 1992).
3. Availability And Class Actions Procedures Vary Under The CPAs
a. Examples Of CPAs That Bar Class Actions
Alabama - Ala. Code § 8-19-10(f) (2000) ("A consumer or other person bringing an action under this chapter may not bring an action on behalf of a class").
Georgia - Ga. Code Ann. § 10-1-399(a) (2000) (prohibiting actions brought "in a representative capacity").
Mississippi - Miss. Code Ann. § 75-24-15(4) (2000) ("Nothing in this chapter shall be construed to permit any class action or suit, but every private action must be maintained in the name of and for the sole use and benefit of the individual person").

Louisiana - La. Rev. Stat. Ann. § 51:1409 (West 2000) (prohibiting actions brought "in a representative capacity").
South Carolina - S.C. Code Ann. § 39-5-140(a) (2000) (prohibiting actions brought in a representative capacity).
b. Examples Of CPAs That Permit Class Actions Subject To Certain Restrictions And Limitations
Utah - Utah Code Ann. § 13-11-20 (2000) (class actions allowed only with respect to act or practice specified as a violation in a rule adopted by the enforcing authority before the act occurred, or by a court in a judgment that was either officially reprinted or made available for public dissemination ten days before the action occurred); *Workman v. Nagle Constr., Inc.*, 802 P.2d 749, 755 (Utah Ct. App. 1990) (concurring opinion) (noting that a class action could not be brought until after publication of a rule or entry of a final judgment declaring the defendant's activities illegal).
New Mexico - N.M. Stat. Ann. § 57-12-10(E) (2000) ("In any class action filed under this section, the court may award damages to the named plaintiff as provided in Subsection B of this section and may award members of the class such actual damages as were suffered by each member of the class").
Ohio - Ohio Rev. Code Ann. § 1345.09(B) (2000) (limiting class action damages to actual damages or other appropriate relief whereas individual plaintiffs may collect up to treble damages).
C. Variations In What Constitutes Deceptive Behavior Under State CPAs
1. State CPAs Vary On Whether Scienter Is Required
a. Examples Of CPAs That Do Not Require A Showing Of Intent To Deceive
Massachusetts - *Bond Leather Co., v. Q.T. Shoe Mfg. Co., Inc*, 764 F.2d 928, 937 (1st Cir. 1985) (Massachusetts law) (intent to deceive is not an element of the violation).
Maine - *Maine v. Bob Chambers Ford, Inc.*, 522 A.2d 362, 365 (Me. 1987) (no showing of intent to deceive required).
Texas - *Williams v. Trail Dust Steak House, Inc.*, 727 S.W.2d 812, 814 (Tex. Ct. App. 1987) (no showing of intent to deceive required).
b. Examples Of CPAs That Require A Showing Of Intent To Deceive
Kansas - *Porras v. Bell*, 857 P.2d 676, 678 (Kan. Ct. App. 1993) (proof of intent required).
Georgia - *Colonial Lincoln-Mercury Sales, Inc. v. Molina*, 262 S.E.2d 820, 823-24 (Ga. Ct. App. 1979) (Georgia requires an "unfair or deceptive act or practice conjoined with culpable knowledge of the nature (but not necessarily the illegality) of the act").

New Jersey - *Knapp v. Potamkin Motors Corp.*, 602 A.2d 302, 304 (N.J. Super. Ct. Law Div. 1991) (delineating higher standard of proof required in private actions).
Utah - *Wade v. Jobe*, 818 P.2d 1006, 1016 (Utah 1991) (defendant must act with intent to deceive).
c. Examples Of CPAs That Require Only A Showing That The Defendant Intended To Induce Reliance
Illinois - *Siegel v. Levy Org. Dev. Co.*, 607 N.E.2d 194, 198 (Ill. 1992) (plaintiff need only prove an intent on part of defendant that plaintiff rely on defendant's statement).
Minnesota - *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 727 (Minn. 1983) (defendant must have intent that others rely on his statements/actions).
d. Examples Of CPAs That Require Proof Of Some Intermediate Degree Of Intent
Tennessee - *Smith v. Scott Lewis Chevrolet Inc.*, 843 S.W.2d 9, 12 (Tenn. Ct. App. 1992) (although intent to deceive need not be shown, the concept of deception requires that an element of intent be present).
e. Examples Of CPAs That Require Showing That The Defendant Knew His Conduct Was Deceptive To Recover
Colorado - *Bidwell v. German Motors, Inc.*, 586 P.2d 1003, 1006 (Colo. Ct. App. 1978) (no violation of CPA where no showing of knowing false representation).
New Mexico - *Stevenson v. Louis Dreyfus Corp.*, 811 P.2d 1308, 1311-12 (N.M. 1991) (stating that the "knowingly made" requirement of New Mexico's CPA is met "if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading").
Oregon - *Luedeman v. Tri-West Constr. Co.*, 592 P.2d 281, 282 (Or. Ct. App. 1979) (noting that "[a] willful [CPA] violation occurs when the person committing the violation knew or should have known that his conduct was a violation").
f. Examples Of CPAs That Do Not Require Any Showing That Defendant Knew His Conduct Was Deceptive
North Carolina - *Forbes v. Par Ten Group, Inc.*, 394 S.E.2d 643, 651 (N.C. Ct. App. 1990) ("That defendants may have made these misrepresentations negligently and in good faith, in ignorance of their falsity, and without intent to mislead, affords no defense to an action under N.C.G.S. § 75-1.1").

Texas - *Henry S. Miller Co. v. Bynum*, 797 S.W.2d 51, 55 (Tex. Ct. App. 1990) (for purposes of Texas CPA, "when a seller makes representations to a buyer, it is under a duty to know if the representations are true"), *aff'd*, 836 S.W.2d 160 (Tex. 1992).
2. State CPAs Vary On What Perspective Is Used To Evaluate Deceptiveness
a. Examples Of CPAs That Measure Deceptiveness Using A "Least Sophisticated Consumer" Standard
Connecticut - *Aurigemma v. Arco Petroleum Prods.*, 734 F. Supp. 1025, 1029 (D. Conn. 1990) (capacity to deceive is measured by effect on least sophisticated).
Texas - *RRTM Restaurant Corp. v. Keeping*, 766 S.W.2d 804, 808 (Tex. Ct. App. 1988) ("The applicable standard is 'whether the statement has a tendency to deceive the ignorant, the unthinking, and the credulous who do not stop to analyze but are governed by appearances and general impressions'") (citation omitted).
b. Examples Of CPAs That Measure Deceptiveness Using A "Reasonable Person" Standard
California - *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1398-99 (E.D. Cal. 1994) (adopting reasonable consumer standard for evaluating deceptive advertising).
New York - *Blue Cross of W. New York, Inc. v. Corcoran*, 163 A.D.2d 877, 878 (N.Y.A.D. 1990) (deceptiveness must be judged by the overall impression to be reasonably expected on a person of average education and intelligence).
c. Examples Of CPAs Where The Applicable Standard Varies According To When The Allegedly Deceptive Actions Occurred
Missouri - *State ex rel. Nixon v. Telco Directory Publ'g*, 863 S.W.2d 596, 601-02 (Mo. 1993) (due to change in statutory language, actual deception standard after 1986 until such time as the attorney general establishes new standards for defining deception).
d. Examples Of CPAs That Have Unique Approaches For Evaluating Deceptiveness
Ohio - *State ex rel. Celebrezze v. Ferraro*, 578 N.E.2d 492, 494 (Ohio Ct. App. 1989) (an act is deceptive if "it has the likelihood of inducing a state of mind in the consumer that is not in accord with the facts").
3. State CPAs Vary On Whether Failure To Disclose Is A Basis For Liability
a. Examples Of CPAs That Do Not Specifically Reference Omissions

California - Cal. Civ. Code § 1770(a) (2000) (no reference to omissions in 23 specifically proscribed activities).
b. Examples Of CPAs That Specifically Reference Omission Of Material Facts
Delaware - Del. Code Ann. tit. 6, § 2513(a) (2000) ("prohibiting misrepresentation or concealment, suppression or omission of any material fact, with intent that others rely thereon").
Illinois - 815 ILCS § 505/2 (1996) ("prohibiting the concealment, suppression or omission of any material fact, with the intent that others rely upon the concealment, suppression or omission of such material fact").
c. Examples Of CPAs That Determine Non-Disclosure Under The Same Standards As Any Other Allegedly Deceptive Or Unfair Act
Louisiana - *Anderson v. Howard Griffin Distribs., Inc.*, 554 So. 2d 695, 707 (La. Ct. App. 1989) (allegation of nondisclosure to be evaluated under deceptive standard).
Massachusetts - *Commonwealth v. Elm Med. Labs, Inc.*, 596 N.E.2d 376, 383 (Mass. Ct. App. 1992) ("deceptive acts or practice may consist of failure to disclose important information").
d. Examples Of CPAs That Have Express Non-Disclosure Provisions And Require An Intent That Consumers Rely On The Omission
Delaware - Del. Code Ann. tit. 6, § 2513(a) (2000) ("prohibiting … concealment, suppression or omission of any material fact, with intent that others rely thereon").
Illinois - 815 ILCS § 505/2 (1996) ("prohibiting the concealment, suppression or omission of any material fact, with the intent that others rely upon the concealment, suppression or omission of such material fact").
e. Examples Of CPAs That Require That Any Deception Be Intentional
Kansas - *Heller v. Martin*, 782 P.2d 1241, 1245 (Kan. Ct. App. 1989) (non-disclosure must be intentional)
New Jersey - *Chattin v. Cape May Greene, Inc.*, 591 A.2d 943, 945 (N.J. 1991) (non-disclosure must be intentional in order to be actionable).
f. Examples Of CPAs That Impose A Duty To Disclose Information Only When The Seller Knows Or Should Have Knowledge Of The Information

Illinois - *Greenberg v. United Airlines*, 563 N.E.2d 1031, 1036 (Ill. Ct. App. 1990) (no duty to disclose with respect to unforeseen developments).
Massachusetts - *Nei v. Burley*, 446 N.E.2d 674, 679-80 (Mass. 1983) (knowledge requirement applicable to duty to disclose claim).
New Mexico - *Richardson Ford Sales, Inc. v. Johnson*, 676 P.2d 1344, 1347-48 (N.M. Ct. App. 1984) (seller must be aware of non-disclosure where CPA explicitly applies only to claims "knowingly made").
g. Examples Of CPAs That Impose A Duty To Disclose Information Regardless Of Whether The Seller Knows Or Should Have Knowledge Of The Information
Maryland - Md. Com. Law Code Ann. § 13-301(3) (2000) ("Failure to state a material fact if the failure deceives or tends to deceive"); *Golt v. Phillips*, 517 A.2d 328, 331 (Md. 1986) (no knowledge or intent required for non-disclosure to be actionable under the Maryland CPA).
4. State CPAs Vary On Whether Individual Reliance Must Be Demonstrated
a. Examples Of CPAs That Require No Showing Of Reliance
Connecticut - *Prishwalko v. Bob Thomas Ford, Inc.*, 636 A.2d 1383, 1388 (Conn. Ct. App. 1994) (stating that plaintiff need not prove reliance under state deceptive practices act).
b. Examples Of CPAs That Require That Plaintiffs Show Individual Reliance
Arizona - *Peery v. Hansen*, 585 P.2d 574, 577 (Ariz. App. 1978) (statutory fraud claim requires showing of damages, which in turn requires showing of reliance).
Georgia - *Delta Chevrolet, Inc. v. Wells*, 371 S.E.2d 250, 251 (Ga. Ct. App. 1988) ("[A] claimant who alleges the [Georgia Fair Business Practices Act] was violated as the result of a misrepresentation must demonstrate that he was injured as a result of the reliance upon the alleged misrepresentation").
c. Examples Of CPAs That Require A Showing Of Reliance Only With Respect To Certain Types Of Violations Or Relax The Required Demonstration In Certain Types Of Cases
Ohio - *Amato v. Gen. Motors Corp.*, 463 N.E.2d 625, 629 (Ohio Ct. App. 1982) ("proof of reliance may be sufficiently established by inference or presumption from circumstantial evidence to warrant submission to a jury without direct testimony from each member of a class").
Oregon - *Sanders v. Francis*, 561 P.2d 1003, 1006 (Ore. 1977) ("Whether ORS 646.638(1) requires reliance as an element of causation necessarily depends on the particular unlawful practice alleged").

d. Examples Of CPAs That Require Reliance To Be Reasonable
Michigan - *Dix v. Am. Banker's Life Assurance Co.*, 415 N.W.2d 206, 209 (Mich. 1987) (reasonable person standard for reliance).
e. Examples Of CPAs That Do Not Require Reliance To Be Reasonable
Arizona - *Parks v. Macro-Dynamics, Inc.*, 591 P.2d 1005, 1008 (Ariz. Ct. App. 1979) (in a private cause of action for statutory fraud, there must be actual reliance but it need not be reasonable); *Holeman v. Neils*, 803 F. Supp. 237, 242 (D. Ariz. 1992) (same).
f. Examples Of CPAs That Require A Showing Of Materiality Rather Than Reliance
New York - *Geismar v. Abraham & Strauss*, 439 N.Y.S.2d 1005 (N.Y. Dist. Ct. 1981) (no need for proof of reliance, sufficient to show that consumer misled in a material way).
g. Examples Of CPAs That Require A Demonstration That Defendant's Actions Induced The Plaintiff To Act Or Refrain From Acting
Hawaii - *Wiginton v. Pacific Credit Corp.*, 634 P.2d 111, 119 (Haw. Ct. App. 1981) (under CPA, injury must be induced by defendant's conduct).
Massachusetts - *Fraser Eng'g Co. v. Desmond*, 524 N.E.2d 110, 113 (Mass. Ct. App. 1988) (CPA does not require showing of reliance as long as there is causal relationship).
Washington - *Smith v. Olympic Bank*, 693 P.2d 92, 96 (Wash. 1985) (relevant standard under CPA is whether defendant's conduct induced plaintiff to act or refrain from acting).
h. Examples Of CPAs That Require A Showing Of Reliance To Demonstrate Proximate Cause In Order To Establish Damages
Delaware - *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074, 1077 (Del. Super. Ct. 1983) (while violation of Act exists "regardless of actual reliance by the plaintiff," damages were available because they were "a direct and proximate result of [defendant's] misrepresentations").
Georgia - *Agnew v. Great Atl. & Pac. Tea Co.*, 502 S.E.2d 735, 736 (Ga. Ct. App. 1998) ("the Act incorporat[es] the 'reliance' element of the common law tort of misrepresentation into the causation element of an individual claim" (internal quotation marks omitted)).
Maryland - *State v. Cottman Transmissions Sys., Inc.*, 587 A.2d 1190, 1201 (Md. Ct. App. 1991) ("the correct measure of restitution would be the sums spent by the consumer in reliance on the practice").

Massachusetts - *Maloney v. Sargisson*, 465 N.E.2d 296, 301 (Mass. App. Ct. 1984) (plaintiffs cannot recover where they "could not have relied upon [the alleged misrepresentations] to their detriment").
New Jersey - *Carroll v. Cellco P'ship*, 713 A.2d 509, 516 (N.J. Super. A.D. 1998) ("Although plaintiffs need not prove reliance under the Consumer Fraud Act, they must show an ascertainable loss as a result of defendant's conduct and a causal relationship.")
Texas - *McCrea v. Cubilla Condo. Corp.*, 685 S.W.2d 755, 759 (Tex. Ct. App. 1985) (misrepresentation must be producing cause of damages); *Cobb v. Dunlap*, 656 S.W.2d 550, 554 (Tex. Ct. App. 1983) ("belief and reliance go toward a showing of factual causation of damages").
Washington - *Nuttall v. Dowell*, 639 P.2d 832, 840 (Wash. Ct. App. 1982) ("[T]this is a private action in which plaintiff seeks recovery of damages and, as such, he must establish some causal link between defendant's unfair act and his injury.... Here, on conflicting evidence, the trial court found that plaintiff did not rely upon defendant's representations.").
D. Variations Concerning What Constitutes "Unfair" Or "Unconscionable" Behavior Under State CPAs
1. CPAs Vary In What Constitutes "Unfair" Behavior
a. Examples Of CPAs That Follow The FTC Standard Set Out In *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 (1972), To Determine What Constitutes Unfair Behavior[7]
Florida - *Dep't of Legal Affairs v. Father & Son Moving & Storage, Inc.*, 643 So. 2d 22, 26 (Fla. Ct. App. 1994) (reciting *Sperry & Hutchinson* standard).
Massachusetts - *See Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc.*, 754 F.2d 10, 17 (1st Cir. 1985) (Massachusetts law) (using *Sperry & Hutchinson* standard).
b. Examples Of CPAs That Follow The Test More Recently Promulgated By The FTC To Determine What Constitutes Unfair Behavior[8]

[7] The *Sperry & Hutchinson* test focuses on (1) whether the challenged practice offends public policy (as reflected by common law, statutory, or other established concepts of unfairness); (2) whether the practice was immoral, unethical, oppressive, or unscrupulous; and (3) whether the practice caused substantial injury to consumers.

Washington - *See Blake v. Federal Way Cycle Ctr.*, 698 P.2d 578, 583 (Wash. Ct. App. 1985) (adopting new FTC unfairness test's emphasis on consumer injury).
c. Examples Of CPAs That Employ A Hybrid Of The Two Standards Or Employ Their Own Standard
California - California courts have developed their own standard in applying California Business & Professional Code § 17200 (2000), under which unfairness is determined by weighing the practice's impact on the victim compared with its business justification. *See Motors, Inc. v Times Mirror Co.*, 102 Cal. App. 3d 735, 740 (Cal. Ct. App. 1980) ("In brief, the court must weigh the utility of the defendant's conduct against the gravity of harm to the [alleged victim]").
Connecticut - *See Vezina v. Nautilus Pools, Inc.*, 610 A.2d 1312, 1317 (Conn. Ct. App. 1992) (using the new FTC standard to amplify the third prong of the old test and refine the meaning of "substantial injury").
2. CPAs Vary In The Relevance Of Violations Of Other Laws
a. Examples Of Jurisdictions Where Violations Of Certain Other Laws Are Considered *Per Se* Violations Of The CPA
Massachusetts - 940 Mass. Regs. Code § 3.16(3)(4) (2001) (act or practice is violation of Massachusetts CPA if: (1) it fails to comply with existing local statutes, rules, or regulations meant to protect Massachusetts consumers or (2) it violates certain federal statutes).
b. Examples Of Jurisdictions Where Violations Of Certain Other Laws Are Not Considered *Per Se* Violations Of The CPA
Texas - Tex. Bus. & Com. Code § 17.43 (1999) ("A violation of a provision of law other than this subchapter is not in and of itself a violation of this subchapter").

[8] The FTC's more recent three-part test provides that an unfair act: (1) must be substantial; (2) must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and (3) must be an injury that consumers themselves could not reasonably have avoided. *See* Reauthorization of the Federal Trade Commission Before the Senate Comm. on Commerce, Science and Transportation, 97th Cong., 2d Sess. 23 (1982), *codified at* 15 U.S.C. § 45(n) (2000).

3. CPAs Vary In What Constitutes "Unconscionable" Behavior
a. Examples Of CPAs That Expressly Prohibit "Unconscionable" Practices
Idaho - Idaho Code Ann. § 48-603C (2000)
Kansas - Kan. Stat. Ann. § 50-627 (1996)
Kentucky - Ky. Rev. Stat. § 367.170 (2000)
Michigan - Mich. Comp. Laws § 445.903 (1995)
New Jersey - N.J. Rev. Stat. § 56:8-1 (2000)
New Mexico - N.M. Stat. Ann. § 57-12-3 (2000)
Ohio - Ohio Rev. Code Ann. § 1345.03 (2000)
Texas - Tex. Bus. & Com. Code Ann. § 17.50 (2001)
Utah - Utah Code Ann. § 13-11-5 (2000)
b. Examples Of CPAs That Define Unconscionable Practices In Different Ways
Texas - *Chastain v. Koonce*, 700 S.W.2d 579, 584 (Tex. 1985) ("Taking advantage of a consumer's lack of knowledge to a grossly unfair degree thus requires a showing that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated").
New Jersey - *Meshinsky v. Nichols Yacht Sales, Inc.*, 541 A.2d 1063, 1066 (N.J. 1988) ("Acknowledging that 'unconscionability' is an 'amorphous concept obviously designed to establish a broad business ethic,' we have defined the term 'as [t]he standard of conduct contemplat[ing] good faith, honesty in fact, and observance of fair dealing'") (citations omitted).
c. Examples Of CPAs That Do Not Expressly Prohibit Unconscionable Practices But Use Unconscionability As A Basis For Determining Whether A Practice Was Deceptive Or Unfair
Connecticut - *See Murphy v. McNamara*, 416 A.2d 170, 177 (Conn. Super. Ct. 1979) (unconscionable agreement found to violate the CPA, where the price charged was abnormally high and the consumer lacked sophistication).

Illinois - *Lane v. Fabert*, 533 N.E.2d 546, 551 (Ill. Ct. App. 1989) (unconscionably high fee for little or no service constituted a CPA violation).
E. Variations In Other Standards Applicable To State CPA Claims
1. CPAs Vary Concerning The Required Notice
a. Examples Of CPAs That Require The Would-Be Plaintiff To Send A Detailed Written Demand To The Defendant, At Varying Dates, Before The Plaintiff Files A Complaint
Alabama - Ala. Code § 8-19-10(3)(e) (2000) ("At least 15 days prior to the filing of any action under this section, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be communicated to any prospective respondent by placing in the United States mail or otherwise.")
California - Cal. Civ. Code § 1782(c) (2001) (No action for damages may be maintained for a violation of section 1770 unless defendant notified of the need for correction, repair, or replacement and is given opportunity to make such correction).
Georgia - Ga. Code Ann. § 10-1-399(b) (2000) ("At least 30 days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive practice relied upon and the injury suffered, shall be delivered to any prospective respondent.")
Massachusetts - Mass. Gen. Laws ch. 93A, § 9(3) (2000) ("At least 30 days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon, and the injury suffered, shall be mailed or delivered to any prospective respondent.")
Texas - Tex. Bus. & Com. Code § 17.505 (2001) ("[A] consumer shall give written notice to the person at least 60 days before filing the suit advising the person in reasonable detail of the consumer's specific complaint").
b. Examples Of CPAs That Require Plaintiff To Take Other Action Before Filing A Complaint
Mississippi - Miss. Code Ann. § 75-24-15(2) (2000) ("In any private action brought under this chapter, the plaintiff must have first made a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the attorney general").
c. Examples Of CPAs That Require That Notice Be Given To A Defendant Within A Prescribed Time Period

Indiana - *A.B.C. Home & Real Estate Inspection Inc. v. Plummer*, 500 N.E.2d 1257, 1262-63 (Ind. Ct. App. 1986) (overturning a CPA award where plaintiff failed to provide proper notice). *But see* Ind. Code §§ 24-5-0.5-2(6)(b)(i), 24-5-0.5-5 (2001) (limitations period will not apply to an "incurable deceptive act," which is one committed "as part of a scheme, artifice, or device with intent to defraud or mislead").
Wyoming - Wy. Stat. 40-12-109 (2000).
d. Examples Of CPAs That Require That A Plaintiff Provide Notice Of The Practice At Issue To The State Attorney General
Connecticut - Conn. Gen. Stat. Ann. § 42-110g(c) (1996) ("[T]he plaintiff shall mail a copy of the complaint to the attorney general").
Kansas - Kan. Stat. Ann. § 50-634(g) (2001) (notice "shall be given to the attorney general, but failure to do so" is not a defense).
Louisiana - La. Rev. Stat. § 51:1409.B (1996) ("Upon commencement of any action … the plaintiff's attorney shall mail copy of the petition to the attorney general and director" but failure to conform with this subsection does not effect any of plaintiffs rights under this subsection).
Oregon - Or. Rev. Stat. § 646.638(2) (1999) (party bring action shall mail copy to attorney general; no judgment will be entered until proof of mailing is filed).
2. Some States Require A Showing That A Public Interest Has Been Affected
Georgia - *See Medley v. Boomershine Pontiac-GMC Truck, Inc.*, 449 S.E.2d 128, 131 (Ga. Ct. App. 1994) (unless defendant's actions have sufficient impact on the consumer marketplace, it is not regulated by the Georgia consumer protection act).
New York - *H;0 Swimwear, Ltd. v. Lomas*, 560 N.Y.S.2d 19, 21 (N.Y. App. Div. 1990) (noting that the consumer protection act "has been held to apply solely to matters affecting the public interest and involving transactions of a recurring nature").
South Carolina - *Jefferies v. Phillips*, 451 S.E.2d 21, 23 (S.C. Ct. App. 1994) (must prove adverse effect on public at large with specific facts); *Daisy Outdoor Adver. Co. v. Abbott*, 451 S.E.2d 394, 397 (S.C. Ct. App. 1994) ("Merely offering evidence, however, that shows a wrongful act has the potential for repetition or that it occurs in the course of business is not enough to establish a violation of the [consumer protection act] if, as the evidence shows here, the conduct adversely affects only the parties involved."), *aff'd in part, rev'd in part*, 473 S.E.2d 47 (S.C. 1996).

Washington - *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986) ("We hold that to prevail in a private CPA … a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in a trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation."); *Campbell v. Seattle Engine Rebuilders & Remanufacturing, Inc.*, 876 P.2d 948, 953 (Wash. Ct. App. 1994) ("The court's language in *Hangman Ridge* clearly requires a showing of public interest impact, separate and apart from a showing of an unfair and deceptive act.").
F. Variations In The Availability Of Various Elements Of Damages Under State CPAs
1. CPAs Vary Widely With Respect To Availability Of Treble Damages
a. Examples Of CPAs That Limit Treble Damages To Situations Where Intent, Willfulness, Or Bad Faith Is Shown
Massachusetts - *Stark v. Patalano Ford Sales, Inc.*, 567 N.E.2d 1237, 1243 (Mass. Ct. App. 1991) (damages may be doubled or trebled if the defendant acted in bad faith or the violation was knowing and willful).
South Carolina - *Payne v. Holiday Towers, Inc.*, 321 S.E.2d 179, 182 (S.C. Ct. App. 1984) (treble damages available under CPA only where defendant's violation is knowing and willful or defendant acted in bad faith).
b. Examples Of CPAs That Will Award Treble Damages In The Absence Of Any Showing Of Intent
North Carolina - *Marshall v. Miller*, 276 S.E.2d 397, 402 (N.C. 1981) ("Absent statutory language making trebling discretionary with the trial judge, we must conclude that the Legislature intended trebling of any damages assessed to be automatic once a violation is shown").
c. Examples Of CPAs That Permit Multiple Damages Upon The Seller's Bad Faith Refusal To Grant The Injured Consumer Relief After The Consumer Notifies The Merchant Of The Deception
Massachusetts - *Parker v. D'Avolio*, 664 N.E.2d 858, 859-60 (Mass. Ct. App. 1996) (unreasonable refusal to settle or bad faith settlement offer can trigger multiple damages). *Cf. Kohl v. Silver Lake Motors, Inc.*, 343 N.E.2d 375, 378 (Mass. 1976) (under CPA, even if plaintiff can demonstrate a knowing or intentional violation, seller can still avoid liability for treble damages by making a reasonable settlement offer).

d. Examples Of CPAs That Make Treble Damages Mandatory If A Seller Violates A Rule Or Other Clear Standard
Ohio - *Bierlein v. Alex's Continental Inn, Inc.*, 475 N.E.2d 1273, 1281-82 (Ohio Ct. App. 1984) (treble damages mandatory where defendant violates rule establishing a deceptive practice), *overruled on other grounds by Einhorn v. Ford Motor Co.*, 548 N.E.2d 933, 935 (Ohio 1990).
2. State CPAs Vary Widely In The Availability Of Attorney's Fees
a. Examples Of CPAs That Preclude The Award Of Attorney's Fees In Class Action Lawsuits
Colorado - *Robinson v. Lynmar Racquet Club, Inc.*, 851 P.2d 274, 280 (Colo. Ct. App. 1993) (attorney's fees not available, under Colorado's CPA in class actions).
b. Examples Of CPAs That Specify The Degree Of Intent Required To Permit The Award Of Attorney's Fees
Michigan - *Temborious v. Slatkin*, 403 N.W.2d 821, 829 (Mich. Ct. App. 1986) (*bona fide* error defense prevents award of attorney's fees if the seller can demonstrate its acts were in good faith and that it had implemented reasonable procedures to avoid the CPA violation).
North Carolina - N.C. Gen. Stat. § 75-16.1 (2000) (fees may be awarded only if the conduct is willful and there is an unwarranted refusal to settle).
Ohio - *See Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.*, 491 N.E.2d 345, 347 (Ohio Ct. App. 1985) (defendant must knowingly commit deceptive act in order for fees to be awarded).
c. Examples of CPAs That Limit Attorney's Fees If Defendants Made A Good Faith Effort To Settle Before The Case Proceeded To Trial
Massachusetts - Mass. Gen. Laws Ann. ch. 93A, § 9(4) (1997) (if reasonable settlement offer is tendered, but consumer proceeds to trial, any fee award is limited to fees incurred prior to settlement offer, even if plaintiff prevails at trial).
d. Examples Of CPAs That Authorize An Award Of Attorneys' Fees To The Prevailing Party, Including The Defendant, In The Court's Discretion
Texas - *Arbuckle Broadcasters v. Rodewell Int'l Corp.*, 513 F. Supp. 412, 420 (N.D. Tex. 1981) (Texas law) (stating that awards of attorney's fees are discretionary); *Schlager v. Clements*, 939 S.W.2d 183, 189-90 (Tex. Ct. App. 1996) (court has discretion to award attorney's fees to defendant when suit was groundless or brought for purposes of harassment).

e. Examples Of CPAs That Mandate An Award Of Attorney's Fees To Prevailing Defendants
Florida - *Smith v. Bilgin*, 534 So. 2d 852, 859 (Fla. Dist. Ct. App. 1988) (granting fees to defendant despite finding action beyond CPA scope).